No. 84-2036

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

Mahfouz El Shahawy, M.D.,
Petitioner

v.

Sarasota County Public Hospital Board, Sarasota, Florida

On Sworn Petition for Writ of Certiorari Directed to District Court of Appeal Florida Second District in Case No. 84-1738

SWORN PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

MAHFOUZ EL SHAHAWY, M.D.
1851 Arlington Street
Suite 206
Sarasota, Florida 33579
(813) 366-9800
Petitioner Pro Se

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QUESTIONS PRESENTED

I

DID THE STATE APPELLATE COURT ERR BY AFFIRMING PER CURIAM WITHOUT EXPRESS OPINION THE TRIAL COURT'S JUDGMENT IN DISMISSING WITH PREJUDICE SHAHAWY'S COMPLAINT FOR EQUITABLE RELIEF CHALLENGING ADMINISTRATIVE ACTION ON RECORD AND NON-RECORD GROUNDS BECAUSE OF THE PENDENCY OF A LATER-FILED PETITION FOR CERTIORARI REVIEW OF THAT ACTION? DID THE APPELLATE COURT ERR BY DENYING DR. SHAHAWY'S MOTION FOR REHEARING?

II

(BY NECESSARY IMPLICATION) HAS THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT (IN THIS CASE THE STATE COURT OF LAST RESORT) DECIDED THE FEDERAL QUESTION, WHETHER DR. SHAHAWY WAS DENIED HIS RIGHT TO PROCEDURAL DUE PROCESS TO HIS DAY IN COURT UNDER THE FIRST SECTION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, ADVERSELY TO PETITIONER HEREIN IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT, OR THE DECISION OF ANOTHER STATE COURT OF LAST RESORT OR THE DECISION OF A FEDERAL COURT OF APPEAL?

III

DID THE STATE APPELLATE COURT OVERLOOK THE FACT THAT THE HOSPITAL ACTED IN AN ARBITRARY, CAPRICIOUS AND DISCRIMINATORY MANNER AGAINST PETITIONER, WHICH PROVIDED SUFFICIENT AND PROPER GROUNDS FOR INJUNCTIVE RELIEF?

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To the Honorable, the Chief Justice and associate Justices of the Supreme Court of the United States:

Mahfouz El Shahawy, M.D., Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of Florida Second District entered in the above-entitled case on February 1, 1985. Motion for Rehearing denied on April 4, 1985. Appendix A (copy of actual order lodged with the Clerk).

OPINIONS BELOW

The "per curiam affirmed" judgment of the District Court of Appeal of Florida Second District whose judgment is herein sought to be reviewed is unreported and is printed in Appendix B (copy of original order lodged with the Clerk).

The journal Entry of judgment of the trial court, the Circuit Court of the Twelfth Judicial Circuit in and for

Sarasota County, Florida, is printed in Appendix C (copy of actual order lodged with the Clerk).

The order of the District Court of Appeal of Florida Second District denying Dr. Shahawy's Motion for Rehearing is printed in Appendix A.

JURISDICTION

The judgment which this Petition seeks to review by certiorari was rendered by the District Court of Appeal Second District and is printed in Appendix B (copy of actual order lodged with the Clerk), and was entered on February 1, 1985. It was a "per curiam affirmed" decision rendered without expressed opinion and affirmed the judgment of the trial court which denied with prejudice because of pending certiorari petition Dr. Shahawy's Motion to Amend Petition for Injunctive Relief, and in fact dismissed his equitable

action with prejudice (Appendix B). A timely Motion for Rehearing was filed on February 15, 1985 and was denied on April 4, 1985 (Appendix 159-164, copy of Motion as lodged with the Clerk) by an order which is printed in Appendix A.

The jurisdiction of the Supreme Court is invoked under and pursuant to 28 USC 1257 (3) by virtue of which final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where any title, right, privilege or immunity is especially set up or claimed under the Constitution of the United States. (Appendix 177). Petitioner herein claims that the State of Florida by the above Florida by the above action has denied him his right to procedural due process, derived from the first section of the Fourteenth Amendment to the United States Constitution,

by denying him his day in court and a hearing in equity on the merits of his case. The District Court of Appeal of Florida Second District was the highest court of Florida in which a decision could be had because "per curiam affirmed" decisions rendered without opinion as of April 1, 1980 are non-reviewable by the Florida Supreme Court because such decisions do not expressly conflict and so confer conflict jurisdiction on the Florida Supreme Court. Nash v. Florida Indus Commission, 88 S Ct 362, 389 US 235, 19 L Ed 2nd conformed to 205 So.2d 700; Dodi Publishing Co. v. Editorial America, S.A. (1980 Fla) 385 So.2d 1369; Robles Del Mar, Inc. v. Indian River Shores (1980 Fla) 385 So.2d 1371; Jollie v. State (1981 Fla) 405 So.2d 418; Gibson v. Avis Rent-A-Car System, Inc. (1980 Fla) 386 So.2d 520, on remand (Fla App D3) 388 So.2d

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Rule 9.030 of the Florida Rules of Appellate Procedure defines the jurisdiction of the Florida Supreme Court and, read in conjunction with the above-cited cases, clearly shows that the District Court of Appeal of Florida Second District was the state court of last resort in this case where no express conflict existed in its "per curiam affirmed" order rendered without express opinion.

QUESTIONS PRESENTED

I

DID THE STATE APPELLATE COURT ERR BY AFFIRMING PER CURIAM WITHOUT EXPRESS OPINION THE TRIAL COURT'S JUDGMENT IN DISMISSING WITH PREJUDICE SHAHAWY'S COMPLAINT FOR EQUITABLE RELIEF CHALLENGING ADMINISTRATIVE ACTION ON RECORD AND NON-RECORD GROUNDS BECAUSE OF THE PENDENCY OF A LATER-FILED PETITION FOR CERTIORARI REVIEW OF THAT ACTION? DID THE APPELLATE COURT ERR BY DENYING DR. SHAHAWY'S MOTION FOR REHEARING?

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STATEMENT OF THE CASE AND FACTS

On October 21, 1983, Dr. Mahfouz El Shahawy ("Shahawy") filed a petition for injunctive and equitable relief in the Sarasota County Circuit Court, seeking to enjoin an October 24, 1983 hearing of the Sarasota County Public Hospital Board ("the Hospital Board"). (App. 5-17, lodged with the Clerk.) That hearing had been scheduled for the dual purposes of considering the denial of Shahawy's medical staff privileges at the Hospital, and the suspension of a particular form of heart catheterization called a "Swan-Ganz" procedure.

At a hearing on Shahawy's petition on October 24, Circuit Judge Silvertooth denied the relief Shahawy had requested. (App. 18-33, lodged with the Clerk.) The sole ground for the court's ruling was that matters raised by Shahawy, as enumerated in his petition, could be argued after the Board hearing was

conducted. Petitioner does not here challenge the pre-Board hearing action by the Circuit Court.

On October 26, the Hospital Board suspended Shahawy's Swan-Ganz privileges and voted not to renew his medical staff privileges. After argument by Shahawy's counsel on rehearing, the Board's actions were reconfirmed on December 12, 1983.

On January 10, 1984, Shahawy timely filed a Petition for Certiorari in the Sarasota County Circuit Court (Case No. 84-115), seeking to preserve his right to a record review of that administrative action. That case was assigned to County Court Judge Parker of Arcadia to sit as a circuit court judge. Shahawy moved to stay the Hospital action pending the court review, but the request for stay was denied. (App. 34-108, lodged with the Clerk.)

After Judge Parker has denied a

stay of the Hospital Board's action because of lack of jurisdiction, Shahawy filed in the earlier injunctive suit a motion to amend his Petition for Equitable Relief. (App. 109-112, lodged with the Clerk.) Shahawy's amended petition sought equitable relief from the Hospital's suspension of his medical privileges, based on enumerated denials of procedural due process guaranteed under state and federal laws and violations of the Hospital's governing by-laws. A hearing on the petition was duly noticed.

At a June 13, 1984 hearing, Circuit Judge Hensley, who had been assigned the hearing, read into the record his denial of Shahawy's petition to amend. (App. 113-124, lodged with the Clerk.) This ruling was formalized by a written final order, signed on June 28, 1984 and filed on July 2, which "denied [Shahawy's motion to amend] with prejudice because

of pending certiorari proceeding."[1] (App. 3, lodged with the Clerk.)

On August 27, 1984, Petitioner himself apppealed the above order. (App. 128-151, lodged with the Clerk.)

Shahawy has deliberately omitted from this statement (i) any reference to other proceedings between these parties, (ii) factual details regarding the merits of the Hospital's termination of Shahawy's medical staff privileges, and (iii) iteration of the details of the dueprocess and by-law violations which surrounded the Hospital's action in terminating his staff privileges. While these would provide interesting "color" for the court and of course are presumed

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[1] The court can judicially notice that the then-pending certiorari proceeding has been voluntarily dismissed on July 5, 1984. Section 90.202(6), Florida Statutes (1983) (App. 125-127, lodged with the Clerk.)

be true for purposes of the court's dismissal with prejudice, they are wholly irrelevant to the issue in this Petition for Writ of Certiorari. That issue is Shahawy's right to maintain an equitable action challenging the administrative action, on record and non-record grounds, during the pendency of a later-filed and already voluntarily dismissed on-the-record certiorari review of the administrative action by the county court. Any attempt to color this petition to the United States Supreme Court for a writ of certiorari with other details or matters could have no purpose but to detract from a determination of this narrow legal issue of denial of Petitioner's due process right to his day in court in equity under Section One of the Constitution of the United States.

Circuit Judge Hensley's order filed on July 2, 1984 "denied [Shahawy's motion

to amend] with prejudice because of pending certiorari proceedings." (App. C.) That order is the root cause of this Petition for Writ of Certiorari. It supplied a new and unexpected basis of claim by Dr. Shahawy of denial of his due process right under the Fourteenth Amendment to the Constitution of the United States to his day in court in equity. That order constituted fundamental error, under the law of Florida, going to the merits of the action because Dr. Shahawy's fundamental right to a day in equity and a trial on the merits was denied him. Sanford v. Rubin infra; American Surety Co. v. Coblentz infra, Vol 3 Fla Jur 2nd page 364; Gibson v. State infra.

Under the law of Florida such fundamental error in civil actions is non-waivable and may be raised at any time on appeal. 3 Fla Jur 2nd page 362;

Cowart v. West Palm Beach infra; Black v. State infra; Ross v. Florida Sun Life Ins. Co. infra.

The issue of denial of Dr. Shahawy's due process right to his day in court in equity by virtue of the Fourteenth Amendment to the Constitution of the United States was brought to the attention of the Appeal Court by Petitioner's attorney, Arthur England, Jr., former Chief Justice of the Florida Supreme Court, in his Initial Brief on Appeal (App. 137-140, lodged with the Clerk) and that issue was also brought to that Appeal Court's attention by Motion for Rehearing. See paragraph four of the Motion for Rehearing (App. 161, lodged with the Clerk) which reads as follows:

> "The trial court's order denying with prejudice Appellant's Motion to Amend Petition for Injunctive Relief in fact dismissed his action with prejudice. Therefore appellant is denied his right to due process guaranteed by the Constitutions of Florida and the United States of America."

The response to the Motion for Rehearing was not only unresponsive but untimely. (App. 4, original copy to Clerk's office; App. 165-168.) Yet the trial judge's order was affirmed per curiam without opinion by the District Court of Appeal of Florida's Second District and Dr. Shahawy's Motion for Rehearing was denied. (App. A, lodged with the Clerk.

ARGUMENT

In affirming the trial court's order denying Dr. Shahawy his day in court in equity, the District Court of Florida Second District must by necessary implication have based its decision on the Federal due process issue raised because the state-law ground of decision is not adequate to support the judgment of the trial court as affirmed by the Appeal Court, as expounded more fully later in this Petition in the Reasons for Granting Writ portion.

Florida follows the substantial competent evidence rule under which the reviewing court does not weight the evidence where administrative act is reviewed by certiorari itself record bound. By way of illustration a contrario in equity the Court may determine whether administrative action shocks the conscience where it is contrary to the overwhelming weight of the evidence on the record, further the court in equity is not record bound. In Florida, physicians wronged by administrative action have the right to maintain both a certiorari action challenging administrative action denying them privileges and an equity action in order that they may be afforded full justice. Sunshores Inc. v. County of Pinellas, 351 So.2d 758 (Fla 2nd DCA 1977); Margolin v. Morton F. Plant Hospital Ass'n Inc., 348 So.2d 57 (Fla 2d DCA 1977); Carida v. Holy Cross Hospital,

Inc., 472 So.2d 803 (Fla 4th DCA 1983); Palm Beach Martin County Medical Center, Inc. v. Panaro, 431 So.2d 1023 (Fla 4th DCA 1983).

REASONS FOR GRANTING WRIT

Certiorari is a process for the review of administrative action which evaluates only the record of the proceeding below. DeGroot v. Sheffield, 95 So.2d 912(Fla. 1957); Town of Indialantic v. Nance, 400 So.2d 37, 40 (Fla. 5th DCA 1981). Errors outside the record, including any denial of constitutional rights which are not "of record," obviously could not have been reviewed in a certiorari proceeding before the county court.

Hence, Shahawy instituted an equitable action in advance of the Hospital Board's scheduled meeting precisely because he knew of the then-existing, pre-hearing, non-record by-law violations

and due process deprivations by that Board. He also anticipated the outcome of that hearing:

> We would like this court to preserve the status quo and not let them go forth at four p.m. and terminate his privileges because, personally, I think it is a foregone conclusion they have made up their minds. They have already decided they will terminate him. (App. 22, lodged with the Clerk.)

Shahawy's request for injunctive relief, filed even before the administrative action which resulted in the termination of his medical staff privileges, obviously launched a viable civil action well before the post-hearing proceeding which was held to be a bar to prosecution of the equitable suit. Denial of Shahawy's request for emergency, pre-hearing relief obviously did not terminate that injunctive action, and the trial judge at that time expressly so ruled:

> Gentlemen, I think you will all have to make those arguments

after you find out what occurs.[2] (App. 32, lodged with the Clerk.)

The predicted occurred, and the Hospital Board in fact terminated Shahawy's medical staff and Swan-Ganz privileges at the conclusion of its administrative hearing. Shahawy then sought to obtain a court determination of the illegitimacy of the Board action in his pending equitable action, consistent with Judge Silvertooth's earlier pronouncement that Shahawy could raise these issues after the Board hearing was held. Due process denials were raised, as they had been earlier, which would not appear on the

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[2]Counsel for the Hospital Board had advised the trial court that another pending certiorari proceeding, from an earlier and less drastic action taken by the Hospital against Shahawy, had no relevance at all to the injunctive action. (App. 24-25, lodged with the Clerk.) Duplication of actions, or judicial resources, consequently, cannot now be asserted for the trial court's prehearing actions. The lack of time alone, not an abuse of judicial resources, led the Trial court to postpone preliminary relief in the injunctive lawsuit.

record of the Board hearing and which, of course, would never appear of record in a certiorari review of that administrative action before the county judge.

Shahawy's attempt to obtain his day in court on all issues was frustrated by the trial court's erroneous dismissal with prejudice. The justification provided by Hospital counsel and adopted by the judge was that Shahawy had endeavored to protect his only direct appellate rights, however limited, merely by filing (and not seeking to prosecute) a record-bound certiorari review proceeding assigned to the county judge.

The trial court's refusal to permit Shahawy to maintain, not newly commence, a pre-existing action for equitable and declaratory relief against the Hospital Board, in order to develop the record and non-record violations of Shahawy's constitutional and by-law guaranteed rights

constitutes error, where the sole reason for the trial court's denial was the pendency of a record-bound certiorari review of the Hospital's administrative action against Shahawy before a county judge.

1. The existence of a rule providing for review by certiorari does not preclude appellant from proceeding in a separate action in equity.

The trial judge dismissed Shahawy's amended petition for injunctive and declaratory relief upon the erroneous assumption that the then-pending certiorari proceeding precluded the pursuance of such equitable relief. Florida law is clearly to the contrary. In Sunshores, Inc. v. County of Pinellas, 351 So.2d 758 (Fla. 2d DCA 1977) the trial court dismissed with prejudice plaintiff's complaint for equitable relief on the ground that the appellate rules provided the remedy of review by certiorari. The same

appellate court Second District reversed, stating that the plaintiff should not be deprived of its right to pursue equitable relief:

> Although Fla. App. Rule 4.1[3] provides for appellate review by certiorari appellants are not thereby precluded from proceeding with the separate action in equity for equitable estoppel, declaratory relief or injunction.

See also, Sundstrom v. Collier County, 385So.2d 1158 (Fla. 2d DCA 1980). The mere existence of another remedy will not preclude a judgment for declaratory relief. Maciejewski v. Holland, 441 So.2d 703 (Fla. 2d DCA 1983).

The preservation of a litigant's right to equitable relief, notwithstanding the availability of certiorari review, is constitutionally mandated in order to preserve a litigant's right of

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[3] Rule 4.1 was the forerunner of current Rule 9.110.

of access to the courts. Article I, Section 21, Fla. Const. Certiorari by its very definition is a narrow, record-bound review. Constitutional issues cannot be raised and determined in an administrative proceeding. Department of Revenue v. Amrep Corp., 358 So.2d 1343 (Fla. 1978); Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So.2d 695 (Fla. 1978). Since not raised in the administrative forum, they cannot be reviewed in a certiorari review by the county judge.

By limiting Shahawy to certiorari review before the county judge, the trial court denied him the opportunity to raise his non-record, due process claims. Those claims here involve Shahawy's most basic, recognized, and important constitutional right: the right of a professional to earn a livelihood. Meyer v. State of Nebraska, 262 U.S. 390, 399

(1923); Cameron v. Int'l. Alliance of Theatrical Stage Employees and Moving Picture Operators, 176 A. 692 (N.J. App. 1935).

Florida law clearly establishes that the mere availability of certiorari review from administrative agency action cannot be interpreted to preclude a claimant's access to court to raise basic, fundamental due process issues. The trial court's dismissal of Shahawy's complaint, as affirmed by the appellate court, was clearly erroneous and must be reversed.

2. The right of a doctor to assert an equitable claim when wrongfully discharged by a hospital is indisputable.

Sarasota County Memorial Hospital is not the first medical institution in Florida, or indeed in the Second District, to attempt to disregard its by-laws and ignore due process in an effort to

terminate one of its doctor's staff privileges. Where trial courts have approved such actions by dismissing the doctors' complaints with prejudice, the Second District Court of Appeal of Florida and other appellate courts have been swift to pronounce such dismissals error, and to order the plaintiffs' complaints reinstated. Margolin v. Morton F. Plant Hospital Ass'n., Inc., 348 So.2d 57 (Fla. 2d DCA 1977); Carida v. Holy Cross Hospital, Inc., 427 So.2d 803 (Fla. 4th DCA 1983). The decisions in those cases govern this petition for certiorari by the United States Supreme Court. The right of a doctor to assert a claim in equity for injunctive and declaratory relief when wrongfully discharged from staff by a hospital is absolute. Margolin, supra; see also, Palm Beach Martin County Medical Center, Inc. v. Panaro, 431 So.2d 1023 (Fla. 4th DCA 1983).

For purposes of a motion to dismiss, all material allegations of a complaint or petition are taken as true. E.g., Maciejewski v. Holland supra. Since there was no suggestion in the trial court that the amended complaint was in any way deficient as a matter of law, under the Margolin decision, Shahawy's petition and amended petition must be deemed to have pled a viable cause of action for injunctive and declaratory relief. Plainly, it was error for the trial court to dismiss the amended complaint with prejudice, and error for the appellate court to affirm that decision. Moresca v. Allstate Insurance Co., (1970, Fla App D4) 231 So.2d 283.

3. The grounds upon which the trial court dismissed Shahawy's complaint were clearly erroneous.

It is irrelevant to consider why the trial court went astray in dismissing Shahawy's complaint with prejudice. The

answer lies in the brief transcript of the June 13, 1984 hearing, where counsel for the Hospital Board argued that the pending certiorari proceeding before the county judge provided reason enough for the trial judge to terminate Shahawy's equitable circuit court action. (App. 173-124,lodged with the Clerk.)

That argument, which fell before a different judge than the one who had heard the pre-ouster request for an emergency injunction and had left the door open for a post-ouster challenge, asserted three justifications for that action: (a) "what's being wronged here is the judicial process"; (b) if amendment were allowed "there would be a second case exactly duplicating [the certiorari proceeding]; and (c) the certiorari proceeding would be "res judicata as to all issues that [Shahawy is] trying to raise in this case." Counsel plainly led the

trial court into error, for none of these grounds is sufficient, as a matter of law, for the dismissal of Shahawy's complaint with prejudice. (App. 116-118, lodged with the Clerk.)

(a) Wronged judicial process. The mere filing of a review petition which preserves common law appellate rights obviously is not an abuse of the judicial process. Shahawy did no more. In fact, he attempted to conserve judicial resources by staying the Hospital order until the case has been resolved on its merit. The Hospital Board opposed and frustrated that effort. Thus, the Hospital Board, not Shahawy, created the very potential of excessive judicial activity of which it later complained to the trial judge.

(b) Exact duplication of proceedings. A record-only review, such as certiorari, is plainly not a duplication

(let alone an exact duplication) of an action which seeks declaratory and equitable relief from record and non-record denials of due process and violations of the Hospital's governing by-laws. Shahawy made no attempt to litigate both matters and thereby waste the judicial resources. Indeed, after he timely filed his petition for certiorari in order to preserve at least the right to a record review, he moved to stay the Hospital ruling until the case has been resolved on its merit. Since the already-pending equitable proceeding would encompass both the record and non-record violations of Shahawy's rights, the proper and logical course would have been to hold the later, less-inclusive certiorari proceeding. Shahawy's attorney proposed that prudent and conservative route, and decided to proceed only with the injunction proceeding. The Hospital Board would not allow matters to proceed,

however, and successfully opposed that before the circuit judge. (App. 113-124, lodged with the Clerk.)

(c) Res judicata as to all issues. For the reasons that certiorari review would in no event duplicate trial of an action for equitable relief, "all" issues would not be involved, let alone adjudicated in the certiorari and equitable proceedings. Some issues, of course, might overlap, to the extent they relate to matters of record. To that extent there could conceivably be some res judicata effect. But there could not have been, as counsel suggested, an identity of issues which would produce total res judicata effect. At the time of appellate court review there could be no res judicata effect on any issues, for the certiorari proceeding has been voluntarily dismissed. (App. 125-127, lodged with the Clerk.)

4. The trial judge erred in abating Shahawy's initial equitable action by dismissing that action with prejudice because a subsequently-filed petition for certiorari was pending.

By dismissing Shahawy's equitable proceeding because of the pending certiorari proceeding, the trial court's action may be viewed as abating, rather than terminating, Shahawy's equitable proceeding. Res judicata was improperly raised by the Board counsel as a defense to bar a collateral proceeding.

The Florida courts have held that an initial action may never be abated in favor of another action which was subsequently commenced. Burns v. Archer, 352 So.2d 121, 122 (Fla. 2d DCA 1977). In Archer, the appellant filed an equitable action for injunctive relief in circuit court. Subsequently, the appellees filed a separate action in which the appellant became a party defendant by operation of

statute. The appellees then filed a motion in the initial proceeding requesting that the two actions be consolidated, and that the appellant's initial action be abated. The trial court granted this motion. Ironically enough, the Second District Court of Appeal reversed, holding among other things than an initial action may never be abated in favor of a later-filed proceeding. Archer, 352 So.2d at 122.

The courts have consisently followed the abatement rule announced by the Florida Supreme Court in State ex rel. Dos Amigos, Inc. v. Lehman, 131 So. 533 (1930). Moreover, abatement is only appropriate if the subsequent suit is brought "in the same court or other court of like jurisdiction if the parties are the same and both suits are predicated on the same cause of action." Lehman, 131 So. at 535; and see, Bartlett v. Bennett,

360 So.2d 1144, 1145 (Fla. 2d DCA 1978).

The suits in these proceedings were not predicated on the same cause of action. See Horter v. Commercial Bank & Trust Co., 126 So. 909 (1930). Nor is the requirement met that both actions must be brought in courts of similar jurisdiction. Shahawy's initial proceeding was an original, equitable action in circuit court for injunctive and declaratory relief. Shahawy's subsequent proceeding, although also necessarily filed in circuit court, invoked that court's appellate jurisdiction to review administrative proceedings. The two proceedings cannot be equated.

> It is clear the certiorari is in the nature of an appellate process. It is a method of obtaining review, as contrasted to a collateral assault. DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957)

The state appellate court overlooked the fact that the Hospital acted in an

arbitrary, capricious and discriminatory manner against Petitioner, which provided sufficient and proper grounds for injunctive relief on the Motion for Rehearing filed on February 15, 1985. (App. 159-164, lodged with the Clerk.) Appellant pointed in detail to this fact!

Specifically: Material facts were misrepresented to the District Court and lower court surrounding a motion heard in the certiorari proceeding on April 4, 1984 (App. 34-108). The true facts, however, will manifest themselves upon reading the transcript of the motion heard on April 4, 1984. (App. 34-108, lodged with the Clerk). This was transcribed on February 13, 1985. It might also be of interest to the Court to note that appellant's counsel at that hearing was Mr. William Hereford, who was a previous Hospital Board member and participated as a member of that Board on previous review

of Dr. Shahawy's privileges:

A. "Especially if you're talking about the 1980 proceeding, because I was one of them. But I think that the point is, Your Honor, that he's had a singular lack of success in motivating this Board over a long period of years now to give him the slightest break whatsoever..." (App. 89, lodged with the Clerk.)

B. "And we maintain that the Board is, because of all this bitterness and all of this fighting, not a qualified Board or tribunal..." (App. 89.)

C. "The record in this case is replete with appeals to appoint objective -- a special master, objective bodies..." (App. 93.)

D. "May be compelled by mandamus to observe it and observe procedures..."(App. 94.)

E. "It should be further pointed out that injunctive relief is available to preserve the status quo." -- That's what this is all about. We want to preserve the status quo pending the outcome of the hearing on the merits of this case. -- "And injunctive relief is available to preserve the status quo..." (App. 95.)

F. "But the feeling that I have in reviewing the record and knowing everything that's transpired over the last four years,

I honestly believe that impartiality on the part of a lay board, even though they're experienced now and acting in a quasi-judicial manner, I believe it's impossible for them to act impartially. It's hard enough for lawyers and judges to act impartially. I know that because I had to struggle sometimes when I was a judge, trying to act impartially. But for lay people to do it, who don't realize and don't -- maybe they don't care that much about the significance of impartiality, I just feel that there was no way that he would have an even chance with that Board..." (App. 106.)

G. "But this is a Hospital Board that is not trained in the law and for one reason or another has never exhibited one iota of objectivity as far as Dr. Shahawy is concerned..." (App. 97.)

H. "The record is replete with negativeness on the part of the Hospital Board and I don't think under stretch of anyone's imagination could Dr. Shahawy expect any relief from that Hospital Board..." (App. 97.)

I. "They didn't have to take his basic privileges away, too. <u>That's an act of retaliation and I think you have to recognize that</u>. [Emphasis added.] Replete in this record are challenges to the Board and they even made a request and there's a proffer of the questions that would be asked to voir dire the

> Board to determine their impartiality, and that was all denied. That Board was ready to go. It was like a lynch mob. In fact, there were two members of the Board that weren't there for the entire presentation of the evidence. One of them didn't vote following the first hearing in October, but then she voted to affirm, claiming that she read the record and that she affirmed. She should have disqualified herself, but she didn't, she voted to affirm..." (App. 107.)

Also, newly discovered evidence of discrimination against Petitioner by the Sarasota County Public Hospital Board further provides sufficient grounds for the injunctive relief sought which was improperly dismissed. During the regular Hospital Board meeting on February 11, 1985, the Hospital Board authorized a physician, William Crick, to practice in the Catheterization Lab for one and one-half years without any certification by the Board of Cardiovascular Diseases. He continued to enjoy these privileges even after having failed his examination.

(App. 163, 166-167, lodged with the Clerk.) The Petitioner was not permitted to perform the same procedure with qualifications exceeding those required from any member currently in the Catheterization Lab. (App. 169-176, lodged with the Clerk.) This is clearly arbitrary and capricious action by the Hospital Board, for which injunctive relief is appropriate. (App. 163, 166-167, lodged with the Clerk.)

For the above reasons Petitioner's right to his day in court in equity was absolute.

Circuit Judge Hensley by an order filed on July 2, 1984 denied Shahawy's Motion to Amend Petition for Injunctive Relief with prejudice and in fact dismissed Shahawy's action with prejudice (App. 121, lodged with the Clerk.)

That order of Judge Hensley contained his state-law ground of decision

in haec verba "Ordered and Adjudged that the said Motion be and the same is hereby denied with prejudice because of pending certiorari proceeding." That order is the root cause of this petition for certiorari. It supplied a new and unexpected basis of claim for Shahawy of denial of his due process right to his day in court in equity by virtue of Section One of the Fourteenth Amendment to the Constitution of the United States. That order constituted fundamental error, under the laws of Florida, going to the merits of the action because Dr. Shahawy's fundamental right to a day in court in equity and a trial on the merits was denied him. 3 Fla Jr 2d page 364. Gibson v. State, (1977, Fla) 351 So.2d 948; Sanford v. Rubin (1970, Fla) 237 So.2d 134, conformed to (Fla App D3) 239 So.2d 49; American Surety Co. v. Coblentz (1967) 381 F2d 185, later app (CA5 Fla) 416 F2d 1059.

Under the law of Florida such fundamental error in civil actions is non-waivable and may be raised at any time. 3 Fla Jur 2d page 362. Cowart v. West Palm Beach (1971, Fla) 255 So.2d 673; Black v. State (1965, Fla App D2) 173 So.2d 166; Ross v. Florida Sun Life Ins. Co. (1960, Fla App D2) 124 So.2d 892.

In his Initial Brief on appeal Shahawy's attorney, Arthur England, Jr., former Chief Justice of the Florida Supreme Court, raised the issue that by limiting Shahawy to certiorari review, the trial court denied him the opportunity to raise his non-record, due process claims in equity involving Shahawy's most basic, recognized, and important constitutional right, the right of a professional to earn a living, and cited Meyer v. State of Nebraska, 262 U.S. 390, 399 (1923) in support of that position, (printed in App. 140, lodged

with the Clerk) and the issue of denial of Dr. Shahawy's right to due process to his day in court in equity under the Fourteenth Amendment to the Constitution of the United States was also raised by Motion for Rehearing on Appeal clearly and in timely fashion to bring the federal due process issue fairly to the Court's attention in paragraph four thereof. (App. 161, lodged with the Clerk.) Giles v. Teasley (1904) 193 US 146, 48 L Ed 655, 24 S Ct 359; 2 Fed Procedure L Ed page 310; Bridge Proprietors v. Hoboken Co.(1864) 68 US 116, 17 L Ed 571; Spencer v. Merchant (1888) 125 US 345, 31 L Ed 763, 8 S Ct 921; Furman v. Nichol (1869) 76 US 44, 19 L Ed 370; Copperweld Steel Co. v. Industrial Com.of Ohio (1945) 324 US 780, 89 L Ed 1363, 65 S Ct 1006.

The District Court of Florida Second District then per curiam affirmed the

trial court's decision and denied Shahawy's Motion for Rehearing. An independent state ground of decision bars further review in the Supreme Court but if a state-law ground of decision does not appear adequate to support the judgment, the Supreme Court will take jurisdiction. 2 Fed Proc, L Ed page 322. Abie State Bank v. Bryan (1931) 383 US 765, 75 L Ed 690, 51 S Ct 252; Williams v. Kaiser (1945) 323 US 471, 89 L Ed 398, 65 S Ct 363; Durley v. Mayo (1956) 351 US 277, 100 L Ed 1178, 76 S Ct 806 reh den 352 US 859, 1 L Ed 2d 69, 77 S Ct 22.

On the assumption that if the decision cannot be supported on state grounds, the state court must have based its decision on its view of federal issues.Williams v. Kaiser (1945) 323 US 471, 89 L Ed 398, 65 S Ct 363; Durley v. Mayo (1956) 351 US 277, 100 L Ed 1178, 76 S Ct 806, reh den 352 US 895, 1 L Ed 2d

69, 77 S Ct 22. 2 Fed Proc L Ed page 322.

In order to be an adequate ground of decision, a non-federal ground must have fair and substantial support, since a federal right cannot be denied on insubstantial grounds. Lawrence v. State Tax Com. (1932) 286 US 276, 76 L Ed 1102, 52 S Ct 556, 87 ALR 374; Demorest v. City Bank Farmers Trust Co. (1944) 321 US 36, 88 L Ed 526, 64 S Ct 384; Staub v. Baxley (1958) 355 US 313, 2 L Ed 302, 78 S Ct 277; NAACP v. Alabama (1958) 357 US 449, 2 L Ed 2d 1488, 78 S Ct 1163; Wolfe v. North Carolina (1960) 364 US 177, 4 L Ed 2d 1650, 80 S Ct 1482, reh den 364 US 856,5 L Ed 2d 80, 81 S Ct 29. 2 Fed Proc L Ed page 322.

Therefore, a state ground must be supported by prior state practice (2 Fed Proc L Ed page 322; Staub v. Baxley (1958) 355 US 313, 2 L Ed 302, 78 S Ct 277) and not be inconsistent with prior

determinations of the state's highest court. Young v. Ragen (1949) 337 US 235, 93 L Ed 1333, 69 S Ct 1037. 2 Fed Proc L Ed 322.

The state law ground of decision was that Dr. Shahawy's motion to amend his petition for injunctive relief was denied with prejudice, and in fact dismissed his action, because of "pending certiorari proceeding." It was not adequate to support that decision because among other things that state ground does not have a fair and substantial support and therefore constitutes insubstantial grounds. Lawrence v. State Tax Com. supra; Demorest v. City Bank Farmers Trust Co. supra; Staub v. Baxley supra; Wolfe v. North Carolina supra.

The Appellate Court must have based its decision on its view of the federal issue presented by Dr. Shahawy of the denial of his federal due process right to

his day in court, under the Fourteenth Amendment to the United States Constitution, by the trial judge. Abie State Bank v. Bryan supra; Williams v. Kaiser, supra; Durley v. Mayo supra. 2 Fed Proc L Ed page 322.

That decision was adverse to Dr. Shahawy and in conflict with the applicable decision of a federal court of appeals in Aetna State Bank v. Altheimer C.A. Ill 1970 430 F.2nd 750, and in conflict with other decisions of other state courts of last resort. Aberdeen Restaurant Corp. v. Gottfried, 285 N.Y.S. 835 (Sup Ct), and in conflict with other applicable decisions of the U. S. Supreme Court. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S Ct 172, 65 L Ed 349; 16 ALR 196; 16A Am Jur page 968, 969. Snyder v. Massachusetts, 291 US 97, 78 L Ed 674, 54 S Ct 330, 90 ALR (ovrld on other grounds Malloy v. Hogan, 378 US 1,

12 L Ed 2d 653, 84 S Ct 1489) and (disapproved on other grounds Duncan v. Louisiana, 391 US 145, 20 L Ed 2d 491, 88 S Ct 1444, 45 Ohio Ops 2d 198, reh den 392 US 947, 20 L Ed 2d 1412 88 S Ct 2270); Powell v. Alabama, 287 US 45 L Ed 158, 53 S Ct 55, 84 ALR 527; Blackmer v. United States, 284 US 421, 761 L Ed 375, 52 S Ct 252; Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 US 151, 76 L Ed 214, 52 S Ct 69; Brinkerhoff-Faris Trust & Savco v. Hill, 281 US 673, 74 L Ed 1107, 50 S Ct 451.

Abatement as used in Statute 28 USC 2105 in Bowles v. Wilke, 175 F.2nd 35, 37 (7th Cir 1949) was defined as being the overthrow of an action which defeats the action for the present but does not debar the plaintiff from commencing it in a better way. In this instant case the trial court's order denying with prejudice Dr. Shahawy's Motion to Amend Petition for Injunctive Relief as affirmed

and adopted by the Florida Appellate Court in fact dismissed his action with prejudice. Notwithstanding 28 USC 2105 in Aetna State Bank v. Altheimer supra, the federal court reversed an order because that order was repugnant to Motion to Abate the action because it dismissed the action instead of staying it. This court clearly may reverse the Florida court's error in this case because its error clearly does not fall within the fair meaning of error immune from reversal under the terms of 28 USC 2105 because like Aetna supra the Florida courts dismissed Dr. Shahawy'a action with prejudice and did not temporarily abate it, and clearly was error. Aetna State Bank v. Altheimer supra; Moresca v. Allstate Insurance Co. supra.

Therefore under Rule 17 (b)(c) of this Court stating considerations governing review on certiorari this Court

should in this case exercise its power of supervision where the District Court of Appeal of Florida Second District has sanctioned such aforementioned departure by the trial court from the accepted and usual course of judicial conduct; and should grant review by certiorari in exercise of its conflict jurisdiction.

CONCLUSION

There has been no due process in this case. There has been no valid reason for breaching the contract -- i.e. medical staff by-laws -- and not renewing Dr. Shahawy's privileges at Sarasota Memorial Hospital after he had served well for over eight years. The Hospital Board has violated every possible provision of the by-laws and has trampled Dr. Shahawy's right to due process. The Board's decisions, and the methods by which it reached those decisions, depart from the essential requirements of law. The Hospital Board is mired in the petty politics among some members of its medical staff and has tried to destroy Dr. Shahawy's livelihood.

Sarasota Memorial Hospital has the only cardiac catheterization laboratory and the only cardiac surgery in town. The Board has denied those facilities to Dr. Shahawy's patients and deprived the

other taxpaying citizens of Petitioner's unequalled expertise. Dr. Shahawy would respectfully submit that his credentials and qualifications far exceed those required from any physician currently practicing at Sarasota Memorial Hospital. The Hospital Board has acted in an arbitrary, capricious and discriminatory manner. Such abuse of power should not be sanctioned.

Dr. Shahawy's medical staff privileges at Sarasota Memorial Hospital have been unlawfully terminated. He has endeavored to assert the impropriety of that action. He has never had his day in court. The trial and appellate courts' action which has denied him access to Florida's courts violates Article 1, Section 21 of the Florida Constitution and due process granted to him under the Fourteenth Amendment to the U. S. Constitution.

For the above reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

STATE OF FLORIDA
COUNTY OF SARASOTA

SWORN AND SUBSCRIBED TO ME THIS 19th DAY OF JUNE, 1985, AND BEFORE ME PERSONALLY APPEARED MAHFOUZ EL SHAHAWY, M.D. TO ME WELL KNOWN AND KNOWN TO ME TO BE THE PERSON WHO EXECUTED THIS DOCUMENT.

NOTARY PUBLIC Beryl E. Adam

My Commission Expires:
2/13/86

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Petition was furnished by mail to Charles Johnson, Chairman, Sarasota County Public Hospital Board, Sarasota Memorial Hospital, 1901 Arlington Street, Sarasota, Florida 33579, this 28th day of June, 1985.

M. EL SHAHAWY, M.D.

Mailed Certified to Supreme Court of the United States of America, Washington, D. C., on June 28th, 1985.

STATE OF FLORIDA
COUNTY OF SARASOTA

SWORN AND SUBSCRIBED TO ME THIS 19th DAY OF JUNE, 1985, AND BEFORE ME PERSONALLY APPEARED MAHFOUZ EL SHAHAWY, M.D., TO ME WELL KNOWN AND KNOWN TO ME TO BE THE PERSON WHO EXECUTED THIS DOCUMENT.

NOTARY PUBLIC

My Commission Expires: 2/13/86

Beryl E. Adams

APPENDIX A

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

April 4, 1985

MAHFOUZ EL SHAHAWY, M.D., Appellant,	)	
v.	)	CASE NO.
SARASOTA COUNTY PUBLIC HOSPITAL BOARD, Appellee.	)	84-1738

Counsel for appellant having filed a motion for rehearing in the above-styled case, upon consideration, it is

ORDERED that said motion is hereby denied.

A TRUE COPY
ATTEST:

WILLIAM A. HADDAD
CLERK, DISTRICT COURT OF APPEAL
SECOND DISTRICT

c: Walter G. Campbell, Jr., Esquire
A. Lamar Matthews, Jr., Esquire

APPENDIX B

NOT FINAL UNTIL TIME EXPERIES TO
FILE REHEARING MOTION AND
IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

MAHFOUZ EL SHAHAWY, M.D.,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO.
	)	84-1738
SARASOTA COUNTY PUBLIC	)	
HOSPITAL BOARD,	)	
	)	
Appellee.	)	
	)	

Opinion filed February 1, 1985.

Appeal from the Circuit Court for Sarasota County: Robert E. Hensley, Judge.

Arthur J. England, Jr., of Fine, Jacobson, Schwartz, Nash, Block & England, Miami, for Appellant.

A. Lamar Matthews, Jr., Frazer F. Hilder and Theodore C. Eastmoore of Williams, Parker, Harrison, Dietz & Getzen, Sarasota, for Appellee.

PER CURIAM.

Affirmed.

GRIMES, A.C.J., and DANAHY and FRANK, JJ.,Concur.

APPENDIX C

TWELFTH JUDICAL CIRCUIT,
IN AND FOR SARASOTA COUNTY,
FLORIDA

CASE NO. 83-3774-CA-01

MAHFOUZ EL SHAHAWY, M.D.,

Petitioner,

v.

SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Respondent.

ORDER ON PLAINTIFF'S MOTION TO AMEND PETITION FOR INJUNCTIVE RELIEF

THIS CAUSE came on to be heard upon PLAINTIFF'S MOTION TO AMEND PETITION FOR INJUNCTIVE RELIEF, and the Court, after being fully advised in the premises, it is

ORDERED AND ADJUDGED that the said Motion be and the same is hereby DENIED with prejudice because of pending certiorari proceeding.

DONE AND ORDERED in Chambers this 28th day of June, 1984.

ROBERT E. HENSLEY
CIRCUIT COURT JUDGE

Copies Furnished To:

WALTER G. CAMPBELL, JR., ESQUIRE

A. LAMAR MATTHEWS, JR., ESQUIRE

JAMES McMANUS, ESQUIRE

LINDA HADDAD, ESQUIRE

STATE OF FLORIDA, COUNTY OF SARASOTA
I hereby certify that the foregoing is a true and correct copy of the original filed in this office.
Witness my hand and seal this Jul 2 - 1984R. H. Hackney, Jr., Clerk of the Circuit Court.

By Susie Belzer, Deputy Clerk

Supreme Court, U.S.
FILED
AUG 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 84-2036

In the

Supreme Court of the United States

October Term, 1985

MAHFOUZ EL SHAHAWY, M.D.,

Petitioner,

vs.

SARASOTA COUNTY PUBLIC HOSPITAL BOARD, SARASOTA, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The
District Court of Appeal of Florida, Second District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A. Lamar Matthews, Jr.
(Counsel of record)
Frazer F. Hilder
Theodore C. Eastmoore
Williams, Parker, Harrison,
Dietz & Getzen
1550 Ringling Boulevard
Sarasota, Florida 33577
(813) 366-4800

Dated: August 26, 1985

BEST AVAILABLE COPY

QUESTION PRESENTED

This case involves the denial of medical staff and clinical privileges to a local physician by a Florida local administrative agency (while acting in its quasi-judicial capacity) which owns and operates a local public hospital. The question presented is:

> Whether the state court erred because it denied petitioner leave to amend an initial pleading and thereby limited petitioner to traditional review of local agency action, rather than allowed petitioner to collaterally attack the agency action through a declaratory judgment proceeding.

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In the

Supreme Court of the United States

October Term, 1985

MAHFOUZ EL SHAHAWY, M.D.,

Petitioner,

vs.

SARASOTA COUNTY PUBLIC HOSPITAL BOARD, SARASOTA, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The
District Court of Appeal of Florida, Second District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Sarasota County Public Hospital Board, respectfully prays that the Court deny the petition for a writ of certiorari to review the decision of the District Court of Appeal of Florida, Second District.

STATEMENT OF CASE

This case involves a limited question of Florida procedural law—whether the trial court erred in denying petitioner leave to amend his complaint. It emanates from, and is inextricably intertwined with, a related action, *Shahawy v. Sarasota County*

Public Hospital Board, case no. 84-115 (Fla. 12th Jud. Cir. filed Jan. 10, 1984) (hereafter "the related action"). Because of the procedural quagmire below, a detailed explanation of the related action and the present case is essential to a complete understanding of the issue before the Court.

Respondent, Sarasota County Public Hospital Board (the Board), is a local administrative agency created by special act of the Florida Legislature for the purpose of owning and operating Memorial Hospital, Sarasota (the hospital). 1949 Fla. Laws ch. 25468 (Spec. Acts). Petitioner, Mahfouz El Shahawy (Shahawy), is a medical doctor and was formerly a member of the hospital's medical staff.

In the related action, the Hospital Board revoked for incompetence Shahawy's clinical privileges to perform Swan-Ganz Procedures (a type of right-side heart catheterization) and denied for disruptive reasons Shahawy's reappointment to the hospital's medical staff. (Resp. App. 76-90) The Board's decision was reached after a *de novo* hearing by the Board acting in its quasi-judicial capacity as a Florida administrative agency. (Resp. App. 76-90) At the hearing, held October 24-26 1983, Shahawy was represented by counsel, presented evidence, cross-examined witnesses, and was afforded other procedural due process guarantees in full compliance with constitutional requirements, the Board's bylaws, and Florida statutory law. (Resp. App. 84-86) After the hearing, the Board made full findings of fact and conclusions of law setting forth in detail the reasons for its action. (Resp. App. 84-90)

Shahawy instituted the present case three days before the scheduled board hearing, for the *sole* purpose of obtaining an injunction to stop the hearing from taking place. (R. 1-13) The petition for injunctive relief was heard before the Florida circuit court, sitting in its capacity as a court of original juris-

diction, [1] on the morning of the scheduled Board hearing. (R. 14) The court denied the injunction and the Board hearing proceeded as scheduled.

Disappointed with the decision reached by the Board in the related action, Shahawy sought appellate review by application for writ of common law certiorari to the Florida circuit court (Resp. App. 5-20), this time sitting in its appellate capactiy. [2] The circuit court subsequently issued an order to show cause and the appeal was fully briefed and set for oral argument. (Resp. App. 5-20, 21, 22-71, 91-113)

On May 22, 1984, eight months after the court had denied Shahawy's initial petition for injunction to stop the Board hearing, almost four months after appeal by certiorari was filed in the related action, and one month after the related action's appeal had been fully briefed, Shahawy moved to amend his initial petition for injunction. (R. 54-55) The proposed amended petition sought to collaterally attack the Hospital Board's action by a separate *de novo* court action for declaratory judgment. (R. 56-59) The circuit court denied the motion to amend (R. 75; Pet. App. 3-3A) and Shahawy

---

[1]The Florida Constitution establishes four branches of state courts: The Supreme Court of Florida, the district courts of appeal, the circuit courts, and the county courts. The supreme court and district courts of appeal have appellate jurisdiction only; the county courts have original jurisdiction only. The circuit courts have original and appellate jurisdiction. Fla. Const., art. V.

[2]In Florida, appellate review of local agency action is had by appeal ("common law certiorari") to the circuit court. DeGroot v. Sheffield, 95 So. 2d 912 (Fla. 1957). Such review is nondiscretionary and available as a matter of right. *See* Cherokee Crushed Stone, Inc., v. City of Miramar, 421 So. 2d 684 (Fla. 4th DCA 1982).

appealed the denial to the Florida Second District Court of Appeal (the Florida appellate court) (R. 76). That court affirmed without written opinion. (Pet. App. 2) It is only this affirmance without written opinion which Shahawy now asks this Court to review. (Pet. 1-5)

Before this appeal was briefed in the Florida appellate court, petitioner dismissed the appeal by certiorari in the related case (Pet. Supp. App., lodged with clerk, 125-127), only three days before oral argument was to be held on August 30, 1984 (Resp. App. 114).

SUMMARY OF ARGUMENT

Shahawy's petition for certiorari seeks in reality a second appellate review of his case. In fact, with few alterations, pages 7-39 of the petition are nothing more than reiteration of Shahawy's brief and motion for rehearing filed in the Florida appellate court. (*see* Pet. Supp. App., lodged with clerk, 128-164) Those pages attempt to explain why the Florida court was wrong under state law. No federal question or citation to controlling federal authority are presented.

The last eight pages of the petition address, in limited fashion, petitioner's sole reason why this Court should review the case—petitioner asserts that the Florida appellate court's decision conflicts with a decision from a federal court of appeals, with a decision of a state court of last resort, and with several decisions of this Court. This brief in opposition sets forth three significant factors which strongly militate against the exercise of this Court's discretionary jurisdiction. Each demonstrates the absence of an important federal question.

First, the Florida appellate court rendered its decision without written opinion. Thus, no precedent was established and no conflict of decisions, as required by rule 17, was

created. In any event, the cases cited by petitioner are dissimilar to this case and do not present a clash of decisions.

Second, petitioner has seriously misstated and omitted facts essential for full and adequate review. Each of these misstatements and omissions will require record inquiry and resolution before any definitive policy decision can be reached.

Third, a review of the procedural factors before the Florida trial and appellate courts discloses that those courts applied well-settled principles of state law in rendering their decisions. The record discloses that petitioner had full and adequate review of administrative action by direct appeal. After pursuing that appeal to the last step before judicial resolution, petitioner attempted to circumvent the established process of review by collateral attack. The lower courts were correct in refusing to allow such an attack.

In short, the decision below presents no special or important federal question or policy determination which dictates review here. The issues presented are significant only to the parties to the proceeding. The application for writ of certiorari should be denied.

ARGUMENT
REASONS FOR DENYING WRIT

A. The Decision Below Does Not Conflict With Decisions Of This Court Or Other Courts.

Petitioner's sole reason for asserting jurisdiction in this Court is that the decision of the Florida appellate court conflicts with a decision of a federal court of appeals, conflicts with a decision of a state court of last resort, and conflicts with decisions of this Court. (Pet. 44-47) Contrary to petitioner's assertion, the decision of the state appellate

court does not and cannot conflict with any decision of any court on any grounds. Indeed, the appellate court rendered no written opinion; the decision in its entirety reads: "PER CURIAM. Affirmed." (Pet. App. 2) Such affirmance without written opinion has no precedential value. *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980). In fact, that is the precise reason why such a decision is not reviewable in the Florida Supreme Court. *Id.; Dodi Publishing Co. v. Editorial America, S.A.*, 385 So 2d 1369 (Fla. 1980). Without a written opinion and without precedential value, it is difficult to perceive how the Florida court's decision could set forth an important federal issue or cause a conflict of decisions which mandates critical review under this Court's extraordinary jurisdiction.

Additionally, even if the Florida court's affirmance without opinion could constitute a basis for conflict, the cases cited by petitioner do not demonstrate any disagreement among the courts. The federal appeals court case cited for conflict is *Aetna State Bank v. Altheimer*, 430 F.2d 750 (7th Cir. 1970). While we question the continuing validity of *Aetna*, [3] the decision is nevertheless distinguishable. In *Aetna*, defendant moved to "abate" a federal court action based upon the pendency of an almost identical state court action between the same parties. The *Aetna* court held that, in abatement, a court should only stay, not dismiss, the action until the related action is

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[3]The Seventh Circuit overruled *Aetna* in Calvert Fire Ins. Co. v. Will, 560 F.2d 792 (7th Cir. 1977). The latter case was, in turn, reversed by this Court. Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978) (plurality opinion). Because this Court did not revive *Aetna* in *Calvert*, and because the reversal in *Calvert* hinged upon a different issue (abuse of the lower court's mandamus powers), *Aetna's* continuing vitality is dubious.

terminated. This holding, which is a product of federal procedural law of questionable value here, presupposes concomitant jurisdiction. *Id.* at 754-755. As we shall see, under the present facts, jurisdiction was only proper in one proceeding, the related action. *See infra. at* 11-12.

The decision of a state court of last resort which petitioner cites for conflict is *Aberdeen Restaurant Corp. v. Gottfried,* 158 Misc. 785, 285 N.Y.S. 832 (Sup. Ct. 1935). That decision, however, was rendered by a New York trial court and cannot be a basis of conflict under rule 17.

The remaining cases cited are decisions of this Court. While most deal with some aspect of due process, none address the point now presented. Even a cursory review of those cases makes this clear: *Duncan v. Louisiana,* 391 U.S. 145 (1968) (due process guarantees right to jury trial in misdemeanor cases); *Malloy v. Hogan,* 378 U.S. 1 (1964)(exercising privilege against self-incrimination is not a basis for contempt); *Snyder v. Massachusetts,* 291 U.S. 97 (1934) (court's refusal to allow defendant to accompany jury to scene of crime does not violate due process); *Powell v. Alabama,* 287 U.S. 45 (1932)(due process requires reasonable time to secure counsel in criminal proceedings); *Blackmer v. United States,* 284 U.S. 421 (1932) (in contempt proceedings, due process is satisfied by suitable notice and adequate opportunity to be heard); *Hardware Dealer's Mutual Fire Insurance Co. v. Glidden Co.,* 284 U.S. 151 (1931) (mandatory arbitration of insurance contract dispute does not violate due process); *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930) (due process extends to state court actions). Without addressing the point now presented, these cases cannot be in conflict.

B. The Petition Seriously Misstates And Omits Facts Critical For Meaningful Review.

This Court is not in the business of canvassing the record in each case to discern essential facts or to correct a party's mischaracterization thereof. "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnson,* 268 U.S. 220, 227 (1925). Yet, petitioner herein asks the Court to do exactly that by misstating, mischaracterizing, and omitting facts critical for review. Such misconduct is reason for denying certiorari. *Conway v. California Adult Authority,* 396 U.S. 107 (1969); *cf. Davis v. Jacobs,* 454 U.S. 911 (1981).

First, petitioner states that his initial petition (to stop the board hearing) was for "injunctive" *and* "declaratory" relief. (Pet. 7, 19) On the basis of this statement, petitioner spins his "before-filed"/"after-filed" and his "wrongful abatement" arguments. (Pet. 19, 30-33) Even the question presented, as framed by petitioner, depends thereon. (Pet. 0) However, a review of the initial petition discloses that only injunctive relief, *not* declaratory relief, was requested. (R. 56-59) The petitioner's brief is blatantly deceptive in maintaining otherwise.

Second, petitioner states that he moved to stay the related action and therefore "attempted to conserve judicial resources" by maintaining only one action for declaratory relief. (Pet. 8-9, 27-28) The statement is false. Petitioner's motion was not to stay the related action but, rather, was to stay the *effective date* of petitioner's removal from the hospital's medical staff *pending completion* of the related action. (Resp. App. 1-4) Similarly, petitioner did not "merely file, and then not seek to prosecute, the certiorari proceeding." (Pet. 19) Rather, petitioner's counsel did everything possible and appropriate to prosecute the certiorari

proceeding. The petition fails to inform the Court that, in the related action, Shahawy filed a 14-page petition (Resp. App. 5-20), The Hospital Board filed a 39-page response (Resp. App. 22-71), and petitioner filed an 18-page reply (Resp. 91-113). In fact, the only matter left before judicial resolution was oral argument. Petitioner, however, dismissed the appeal three days before the oral argument was to occur.

Third, throughout his brief, petitioner refers to alleged "non-record due process claims" which may only be addressed, says petitioner, by collateral attack on the Hospital Board's decision. (*see e.g.* Pet. 0, 11, 22, 27-28) Petitioner states that his proposed amended petition for declaratory relief raises those "non-record" claims. (Pet. 28) Contrary to petitioner's assertion, a side-by-side comparison of the claims asserted in the proposed amended petition for declaratory judgment (R. 56-59) and the claims asserted in the related action's appeal by certiorari (Resp. App. 5-20) reveals an exact identity of issues:

SHAHAWY'S CLAIMS	*PROPOSED COMPLAINT IN THIS CASE*	*PETITION IN RELATED ACTION*
1) The Executive Director did not concur in the summary suspension of Swan-Ganz privileges.	par. 7	pp. 3, 10
2) Instead of an Executive Committee hearing on the Swan-Ganz suspension, there was an investigation by an ad hoc committee.	par. 9	p. 4
3) Shahawy was not provided pertinent infor-		

	mation at various stages of the proceedings within the Hospital.	par. 10	p. 11
4)	Shahawy was not given a hearing before any medical staff committee.	par. 10	p. 10
5)	The Board's decision was not based on competent and substantial evidence.	par. 11	p. 12

Although the petition makes other misrepresentations and omissions, [4] the foregoing suffice to illustrate the nature of petitioner's allegations. These allegations will make difficult a decision by this Court on the basis of the *actual* facts below. Such is a significant reason for denying certiorari. "Were we to pass upon the purely artificial and hypothetical issue tendered by the petition for certiorari we would not only in effect be rendering an advisory opinion but also lending ourselves to an unjustifiable intrusion upon the time of this Court." *Conway*, 396 U.S. at 110.

C. Well-Settled Principles of State Law Support The Lower Court's Ruling.

Declining to issue an opinion, the state appellate court presented no definitive reasons for its affirmance of the trial court's decision. However, established principles sup-

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[4]For example, even though the record demonstrates that the "court" in the related action was the Florida *circuit* court sitting in its appellate capacity (Resp. App. 5), and petitioner so acknowledges (Pet. 8), the petition constantly refers to the court as the *"county"* court. (*see, e.g.* Pet. 11, 16, 20).

port the affirmance. *See Escarra v. Winn Dixie Stores, Inc.*, 131 So. 2d 483 (Fla. 1961).

1. In Florida, Quasi-Judicial Local Administrative Agency Action Is Reviewable Only By Common Law Certiorari.

It is settled in Florida that quasi-judicial administrative action of a local agency is reviewable only by common law certiorari to the circuit court in its appellate capacity. *DeGroot v. Sheffield*, 95 So. 2d 912 (Fla. 1957); *Board of County Commissioners v. Casa Development, Ltd.*, 332 So. 2d 651 (Fla. 2d DCA 1976). Quasi-judicial action is defined as a proceeding

> held upon notice at which the affected parties are given a fair opportunity to be heard in accord with the basic requirements of due process, including the right to present evidence and to cross-examine adverse witnesses, and the judgment of the agency or board should be contingent upon the showing made at the hearing.

Casa Development, Ltd., 332 So. 2d at 654; *accord DeGroot v. Sheffield.* Furthermore, appellate review by certiorari of local agency action is mandatory. The Florida circuit court must determine whether the agency:

1. Accorded procedural due process;
2. Observed the essential requirements of law; and
3. Supported its findings by substantial competent evidence.

Cherokee Crushed Stone, Inc. v. City of Miramar, 421 So. 2d 684, 689 (Fla. 4th DCA 1982).

Under the foregoing authorities, a party aggrieved by agency action may not collaterally attack the action by declaratory

judgment proceeding but is limited to appellate review in the circuit court by certiorari. [5]

In the related action, the Hospital Board acted in a quasi-judicial fashion by holding a hearing at which petitioner was given a fair opportunity to be heard, was given the right to present evidence, and was given the right to cross-examine witnesses. Moreover, the Hospital Board made findings of fact and conclusions of law based upon evidence presented at the hearing, and it founded its decision thereon. Accordingly, petitioner's only remedy was a direct appeal to the circuit court. [6]

2. Shahawy Was Estopped, By Filing The Related Action, From Seeking Alternative Relief.

For the purpose of this section, let us assume that petitioner could choose different paths for review of the Hospital Board's action—direct appeal on one hand and collateral at-

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[5]The only exception to this rule is that, if a party challenges the constitutional validity of the *agency's enabling legislation*, he may assert that issue in a collateral proceeding. *Key Haven Assocd. Enters., Inc. v. Board of Trustees*, 427 So. 2d 153 (Fla. 1982). Petitioner does not challenge the Hospital Board's enabling statute here.

[6]It is of no consequence that petitioner claims "absolute" a physician's right to challenge a denial of staff privileges by declaratory judgment action. (Pet. 23-25) The Florida cases cited for this proposition involve *private* hospitals where no other review is available. Carida v. Holy Cross Hospital, Inc., 427 So. 2d 803 (Fla. 4th DCA 1983); Margolin v. Morton F. Plant Hosp. Ass'n, Inc., 348 So. 2d 57 (Fla. 2d DCA 1977). Conversely, this case involves review of local *governmental* administrative action where the proper method of review is clearly established.

tack on the other. Even so, Florida Law holds that the election and prosecution of one remedy precludes the other. In *Key Haven Associated Enterprises, Inc. v. Board of Trustees,* 427 So. 2d 153 (Fla. 1982), the Supreme Court of Florida considered a challenge to the facial constitutionality of an agency's enabling statute. When such a challenge is made, a party may choose either to seek relief by direct appeal or by declaratory judgment. The court warned:

> We note, however, that once a party chooses one or the other alternative, he is foreclosed from proceeding with the alternative remedy.

Id. at 157; *see State v. Atlantic International Investment Corp.*, 438 So. 2d 868 (Fla. 1st DCA 1983).

Under the facts now before the Court, even if Shahawy had possessed the right to pursue declaratory relief, he was precluded from doing so after he filed and prosecuted the certiorari proceeding.

Notwithstanding the foregoing premise, petitioner argues that the declaratory judgment action was the "prior-filed" suit and that the direct appeal in the related case was the "latter-filed" suit. Thus, petitioner urges, he elected declaratory relief first. This "before-filed"/"after-filed" argument is of no help to petitioner. As previously pointed out, the initial petition for injunction was solely to stop the Hospital Board hearing in the related case. The petition did not contain a plea for declaratory relief. In fact, it was not until *after* petitioner's direct appeal was fully briefed and awaited only oral argument that petitioner filed the proposed petition for declaratory judgment. Accordingly, the trial and appellate courts below correctly denied petitioner's collateral attack guised as a motion to amend.

CONCLUSION

For the foregoing reasons, the writ of certiorari to the District Court of Appeal of Florida, Second District, should be denied.

Respectfully submitted,

A. Lamar Matthews, Jr.
(counsel of record)
Frazer F. Hilder
Theodore C. Eastmoore
Williams, Parker, Harrison,
Dietz & Getzen
1550 Ringling Boulevard
Sarasota, Florida 33577
(813) 366-8400

Attorneys for Respondent,
Sarasota County Public Hospital Board

Dated: August 26, 1985.

Supreme Court, U.S.
FILED
AUG 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 84-2036

In the

Supreme Court of the United States

October Term, 1985

MAHFOUZ EL SHAHAWY, M.D.,

Petitioner,

vs.

SARASOTA COUNTY PUBLIC HOSPITAL BOARD, SARASOTA, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The District Court of Appeal of Florida, Second District

APPENDIX
TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

A. Lamar Matthews, Jr.
(Counsel of record)
Frazer F. Hilder
Theodore C. Eastmoore
Willams, Parker, Harrison, Dietz & Getzen
1550 Ringling Boulevard
Sarasota, Florida 33577
(813) 366-4800

Dated: August 26, 1985

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TO ORDER TO SHOW CAUSE 91

NOTICE OF HEARING 114

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR SARASOTA COUNTY, FLORIDA

CASE NO. 83-1534-CA-01

MAHFOUZ EL SHAHAWY, M.D., etc.,

Petitioner,

CONSOLIDATED WITH

vs.

CASE NO. 84-115-CA-01
Division P

SARASOTA COUNTY PUBLIC HOSPITAL BOARD, a body corporate

Respondent.

_____ /

MOTION FOR STAY

Petitioner moves for stay pending review of the action of the Respondent suspending him from the Sarasota Memorial Hospital medical staff and purporting to deny his request for reappointment to the medical staff and affirm the suspension of his privileges to do Swan-Ganz catherization procedures and shows:

1. Petitioner has filed his Petition for Certiorari seeking review of the actions of the Respondent on October 31, 1983 (re-hearing denied December 12, 1983).

2. A stay of the actions of the Respondent is necessary to prevent a change of the status quo and to provide meaning to the relif (sic) Petitioner seeks.

3. As other specific reasons for requesting stay, Petitioner would whos:(sic)

(a) Petitioner is deprived of the opportunity to be consulted by other physicians concerning the care of patients at Sarasota Memorial Hospital, and is limited by Respondent's actions to consultation practice at Doctors Hospital, where

Petitioner has full staff privileges.

(b) Petitioner will have to abandon patients who need cardiac catherization and cardiac surgery which are only performed at Sarasota Memorial Hospital.

(c) Sarasota Memorial Hospital is the only hospital handling major trauma cases, and Petitioner is unable to assist in the health care of any of his cardiac patients suffering major trauma.

(d) Petitioner has purchased his office facilities in the same city block as Sarasota Memorial Hospital and has invested money in equipment at that location in order to better serve patients at Sarasota Memorial Hospital, and if a patient suffers an acute condition, Petitioner has to have that patient admitted to Doctors Hospital, or has to obtain another cardiologist to care for such patient at Sarasota Memorial Hospital.

(e) As a reciprocal courtesy, Petitioner and other physicians provide cover for one another that requires that all of the physicians in the cover group have privileges at all hospitals; because of the action of Respondent, Petitioner is unable to cover for the others as he is unable to care for the patients of the other physicians at Sarasota Memorial Hospital; the result of this action is that Petitioner is unable to secure reciprocal coverage of his patients in his absence.

(f) Some of Petitioner's patients have expressed a desire not to be admitted to Doctors Hospital, insisting on being admitted to Sarasota Memorial Hospital; these patients feel that their taxes support Sarasota Memorial Hospital and feel that because of the actions of the Respondent, they are deprived of the services of the physician of their choice.

(g) Petitioner is the only cardiologist currently in Sarasota County authorized by the Food and Drug Administration to use certain drugs pending final approval of these drugs, and which drugs have proven effective where

other medications have failed.

(h) A patient who was then under Petitioner's continuing out-patient care experienced an acute emergency, and, after his wife contacted Petitioner (who directed that her husband be brought to Doctors Hospital) was taken to Sarasota Memorial Hospital emergency room by the Emergency Mecical (sic) Technicians because his treatment was directed by the Sarasota Memorial Hospital emergency room doctor over the telemetry system; the emergency room physician was not a qualified cardiologist and did not have the background information concerning the patient possessed by Petitioner; the patient died.

(i) Since Petitioner has been denied privileges at Sarasota Memorial Hospital, he has found that his patients are confused regarding his ability to treat them; he has further found that new patients may want to retain his services but cannot understand why he is qualified at Doctors Hospital but not qualified at Sarasota Memorial Hospital.

(j) The ground claimed for removal of the Swan-Ganz catherization procedure privileges were effectively refuted, and no specific patient-care grounds were stated or claimed for removal and failure to renew the other staff privileges, and renewal or retention of these privileges during the pendency of this review will not endanger the health, welfare or safety of Petitioner's patient if they are treated at Sarasota Memorial Hospital (as they are presently being treated at Doctors Hospital).

(k) A stay of the Respondent's actions will prevent irreparable injury to Petitioner's reputation and livlihood, (sic) and the health, welfare and care of Petitioner's patients.

(l) Petitioner has not sought a stay by the Respondent because such request would be a futile attempt in view of the attitude of Respondent and the past violations of Petitoner's rights by Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to JOHN V. CANNON, III, Williams, Parker et al., P.O. Box 3258, Sarasota, Florida 33578 this 15th day of February, 1984.

GUY B. BAILEY, JR.
Bailey & Daws
One Biscayne Tower, Suite 1820
Two South Biscayne Blvd.
Miami, Florida 33131

HEREFORD, TAYLOR & LAWLESS, P.A.
46 North Washington Blvd., Suite 21
Sarasota, Florida 33577
(813) 366-0911

BY: /S/
William M. Hereford

IN THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR SARASOTA COUNTY, FLORIDA
CASE NO. 84-115-CA-01
Divison E - Parham

MAHFOUZ EL SHAHAWY, M.D., M.S., F.A.C.P., F.A.C.C.
Petitioner,
vs.
SARASOTA COUNTY PUBLIC HOSPITAL BOARD,
a body corporate,
Respondent.

_____ /

PETITION FOR CERTIORARI

Mahfouz El Shahawy, M.D., M.S., F.A.C.P., F.A.C.C. (''Dr. El Shahawy'') respectfully files this petition for writ of certiorari, pursuant to Rule 9.100, Fla.R.App.P., and other applicable rules and laws, seeking review of certain actions of the Sarasota County Public Hospital Board, a public body corporate.

I. *JURISDICTION*

Dr. El Shahawy seeks review of the October 31, 1983 decision (rehearing denied December 12, 1983) of the Sarasota County Public Hospital Board, suspending him from the Sarasota Memorial Hospital medical staff, and purporting to deny his request for reappointment to the medical staff and affirm the suspension of his privileges to do Swan-Ganz catheterization procedures. This Court has jurisdiction pur-

suant to Art. V, §5, Fla.Const., and as reflected in Rules 9.030 (c) (1) (C), 9.100, and 9.110 (a) (2), Fla.R.App.P. *See also Fla. Stat.* Chapter 395; Chapter 26468, Special Acts of Extraordinary Session of 1949, as amended.

II. *STATEMENT OF THE FACTS*

Dr. El Shahawy is a preeminent cardiologist. He received his initial medical training at the University of Vienna, Austria, graduating *summa cum laude* and earning diplomas in internal medicine and cardiology. He came to the U. S. and continued his training at the Mayo Clinic, where he received a Master of Science degree in Cardiovascular Disease, and at the Medical College of Georgia. Throughout his training he engaged in extensive research and publication. He was on the faculty at the University of Florida, during which time he was the Director of the Catheterization Laboratory, Founding Director of the Heart Station, and Director of the Cardiac Intensive Care Unit at Shands Teaching Hospital. He is certified by the American Board as a diplomate in internal medicine and in cardiovascular disease. He is a fellow of numerous prestigious professional societies, and continues his pursuit of professionalism through local, national, and international conferences, symposia, and other activities.

Dr. El Shahawy has practiced at Sarasota Memorial Hospital for eight years, earning a well-deserved following among his patients and an unexcelled reputation as a cardiologist. He has never been the subject of any patient complaints or lawsuits, and indeed never had any problems with the medical staff or employees until he dared to challenge certain medical staff members when they baselessly tried to keep him out of the catheterization laboratory.

On February 7, 1983, the Hospital Board denied Dr. El Shahawy's application for privileges in the cardiac catheterization laboratory at Sarasota Memorial Hospital. On

May 6, 1983, Dr. El Shahawy filed a petition for certiorari directed to that decision. This Court (Case No. 83-1534-CA-01 Div. P) ordered the Hospital Board on June 16, 1983, to show cause why relief should not be granted. That proceding (sic) is still pending. Dr. El Shahawy requests this Court to take judicial notice of the court file in that proceeding.[1]

After the Hospital Board had denied Dr. El Shahawy's application for cardiac catheterization privileges, the Chief-of-Staff, Dr. Charles Mathews (whom Dr. El Shahawy had sued), wrote Dr. El Shahawy on April 8, 1983, stating that he was summarily suspending Dr. El Shahawy's privileges to do Swan-Ganz catheterizations.

The Medical Staff By-Laws state as follows:

> The Executive Director *and* any one of the following: Chief-of-Staff, chief of a section, Executive Committee, Adminstrative Committee, shall have the authority, whenever action must be taken immediately, in the best interest of patient care in the hospital, to summarily suspend or any portion [sic] of the clinical privileges of a physician or dentist, and such summary suspension shall become effective immediately upon imposition.

---

[1] Dr. El Shahawy has also challenged the actions of the various individuals who have been instrumental in excluding him from the catheterization laboratory, in a lawsuit in federal court. That suit replaced a suit in this Court, which was then voluntarily dismissed. Dr. El Shahawy also filed defamation actions against two physicians (not members of the Sarasota Memorial Hospital Medical Staff) who had defamed him before the Hospital Board in 1980. The Hospital Board has vigorously defended all of this litigation with public funds, and, in December, 1982, while all of the above was pending, passed a resolution purporting to agree to indeminfy any and all witnesses and participants in the proceedings on Dr. El Shahawy's applications, "to the limits of Florida law."

Dr. Mathew's attempt to suspend Dr. El Shahawy's Swan-Ganz privileges was in blatant violation of this provision in the By-Laws. Dr. Mathews later sought to manufacture evidence that he had in fact obtained the concurrence of the Executive Director, Mr. H. J. Floyd; however, Dr. El Shahawy conclusively documented that Dr. Mathews did not (sic) such thing. Everything that followed is based on Dr. Mathews' Apirl (sic) 8 letter, and is for that reason inherently defective.

Dr. Mathews purported to rely on a Swan-Ganz catheterization Dr. El Shahawy performed on April 6. There is absolutely no dispute that the procedure was successful, and that the patient tolerated the procedure well and was discharged shortly thereafter in satisfactory condition. Dr. Mathews said, however, that he had "documentation" indicating that the procedure took over two hours to perform, required three separate incisions and a radioopaque dye, and resulted in "substantial blood loss." Dr. Mathews concluded:

> Because of the documented lack of expertise in performing this procedure, your privileges in Swan-Ganz insertions are suspended, effective immediately, and it is being referred to the Chief-of-Medicine for evaluation and recommendation by the appropriate committee.

The By-Laws further provide:

> A physician or dentist whose clinical privileges have been summarily suspended shall be entitled to request that the Executive Committee of the medical staff hold a hearing on the matter within a reasonable time period thereafter as the Executive Committee may be convened in accordance with Article VIII of these By-Laws.

This rule too was blatantly ignored. Dr. Mathews, after unilaterally suspending Dr. El Shahawy's Swan-Ganz privileges, provided Dr. El Shahawy with the supposed documentation referred to in his letter, which he demonstrably did not have on April 8 — self-serving

memoranda from technicians purporting to question Dr. El Shahawy's technique. Dr. El Shahawy on April 12, 1983, reponded to Dr. Mathews' letter and explained in meticulous detail the grave situation confronted with the patient's condition on April 6, the procedures which were followed, and the exemplary results. Dr. El Shahawy also requested a hearing before the Executive Committee.

Dr. Mathews, instead of scheduling an Executive Committee hearing as required by the By-Laws, appointed a hand-picked "ad hoc committee" to investigate Dr. El Shahawy's privileges.

Dr. El Shahawy objected to the appointment of this ad hoc committee, but requested that any proceedings be open to him, and that he be advised of its membership. These requests were denied.

Dr. El Shahawy appeared before the ad hoc committee on May 12. Dr. El Shahawy objected that several committee members were either defendants or partners of defendants in prior litigation with Dr. El Shahawy, and requested that they disqualify themselves; moreover, not one of the members was a cardiologist. The request was denied. Dr. El Shahawy again explained in great detail the April 6 procedure and also explained to the ad hoc committee the unauthorized suspension by Dr. Mathews of Dr. El Shahawy's privileges.

The ad hoc committee was unable to support the suspension. The committee reported simply that Dr. El Shahawy's account of the April 6 procedure conflicted with that of the technicians and that the charts of Dr. El Shahawy's other recent Swan-Ganz procedures showed no problems. The Executive Committe (sic) on May 16 (in closed session) received the report, and scheduled a hearing for June 1, 1983. Dr. El Shahawy immediately demanded, as provided for in the By-Laws, that he be given "the specific charges, acts or omissions, omissions, (sic) including the list of specific or representative charts being questioned, together with any other perti-

nent information which was considered in the adverse recommendation or decision.''

Apparently, however, those who were conspiring to throw Dr. El Shahawy out of the hospital were dissatisfied with their ad hoc committee's report. The committee was asked to reconvene on May 27, 1983. The resulting report states:

> On 24 May 1983, members of this Committee were informed of additional material which recently became available and which directly pertained to the subject and to the Committee's consideration. The duties of the Committee with regard to its recommendations to the Executive Committee were also clarified. The recommendations are to include modification, continuance or termination of the summary suspension.

The committee then reviewed deposition testimony of various technicians (including one deposition ordered overnight for this very purpose), and recommended that the summary suspension be continued.

Dr. El Shahawy was not shown this report before the June 1 hearing. Nor was Dr. El Shahawy permitted to have counsel present at the hearing. Dr. El Shahawy objected to the lack of due process in the proceedings, and requested Dr. Mathews to turn the gavel over to another. That request was denied. Dr. El Shahawy asked the court reporter to swear Dr. Mathews so that he may be interrrogated. *Dr. Mathews refused.* Dr. El Shahawy nevertheless demonstrated that Dr. Mathews' summary suspension was a complete fabrication and was based on altered documents and perjured testimony.

Over a month passed without Dr. El Shahawy's hearing a word from the Executive Committee. Finally, Dr. Mathews advised Dr. El Shahawy that the Executive Committee's ''special meeting'' would be reconvened on July 6. Although Dr. El Shahawy advised the Committee he was unavailable on that date, the Committee reconvened and recommended con-

tinuation of the summary suspension of Dr. El Shahawy's Swan-Ganz privileges.

On the very next day, July 7, 1983, the Hospital Board met in closed session and voted not only to consider the suspension of Dr. El Shahawy's Swan-Ganz privileges, but also to consider suspending Dr. El Shahawy from the medical staff itself, citing allegations of clinical incompetence and disruptive behavior. After extensive machinations to prepare complex memoranda, rules of procedure, etc., and to deny Dr. El Shahawy pertinent information (the Board refused even to give Dr. El Shahawy a witness list) needed to present his case, the matter came on for hearing before the Hospital Board on October 24, 1983. Contrary to the express requirements of the By-Laws and of Florida Statutes Chapter 395, Dr. El Shahawy was never given any hearing before any medical staff committee.

With a police officer standing ready to sweep in, the Board listened to a charade of incompetent testimony about Dr. El Shahawy's supposedly disruptive behavior (*i.e.*, his refusal to have his rights trampled) and his supposed clinical incompetence (*i.e.*, opinions of technicians, although he has never experienced any patient difficulty or had any medical malpractice suits, and has excelled as could only be expected from his superior training and education). Dr. El Shaahwy (sic) in response presented the testimony of the very patients he had supposedly mistreated and the only testimony by physicians who had observed Dr. El Shahawy's work; all demonstrated Dr. El Shahawy's remarkable expertise.

Dr. El Shahawy sought to question the Board members themselves, to convince them of their biases and to expose to themselves, the public, and this Court the shameful manipulations which had brought Dr. El Shahawy before that tribunal. But, the Board would not permit it.

As expected, the Board voted to suspend Dr. El Shahawy

from the medical staff. On rehearing, Dr. El Shahawy urged the Hospital Board to consider the actual charts of the patients involving Swan-Ganz catheterizations which the ad hoc committee had supposedly reviewed (and which conclusively negated all of the scurrilous testimony), and the intervening decision of Doctors' Hospital to sustain Dr. El Shahawy's Swan-Ganz privileges there. The Hospital Board received and ignored the charts. And despite the fact that at the hearing the Board itself requested copies of Doctors' Hospital's deliberations (not knowing then the result was favorable to Dr. El Shahawy), the Board excluded Doctors' Hospital's findings.

III. *RELIEF SOUGHT*

Dr. El Shahawy seeks a writ of common law certiorari to the Hospital Board, quashing its orders of November 9 and December 12, 1983, and such other and further relief as is proper.

IV. *ARGUMENT*

This Court must determine "whether procedural due process was accorded, whether the essential requirements of the law have been observed, and whether the administrative fin-

tial evidence." *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). And although this is necessarily filed and treated as an original proceding under Rule 9.100, Dr. El Shahawy respectfully submits that the mandatory language in *Vaillant* compels this Court to issue an order to show cause. *See Bowen v. City of Hollywood,* 428 So.2d 673 (Fla. 4th DCA 1983).

A. *Dr. El Shahawy Was Not Afforded Procedural Due Process*

Dr. El Shahawy had, at a minimum, a constitutional right to a full and fair hearing before an impartial tribunal and to be

fairly judged by rational standards. *See generally Metropolitan Dade County v. Sokolowski*, 439 So.2d 932 (Fla. 3d DCA 1983); *Deel Motors, Inc. v. Dept. of Commerce*, 252 So.2 (sic) 389,394 (Fla. 1st DCA 1971); *Larson v. Florida Real Estate Commission*, 227 So.2d 886 (Fla. 4th DCA 1969).

Fla. Stat. §§395.0ll and 395.0115 and the regulations of the Department of Health and Rehabilitative Services require all hospitals (and here, the Respondent is a public hospital) to establish and follow fair substantive standards and procedures to govern all privileging questions. *See Palm Beach-Martin County Medical Center, Inc. v. Panaro*, 431 So.2d 1023 (Fla. 4th DCA 1983); *Carida v. Holy Cross Hospital, Inc.*, 427 So. 2d 803 (Fla. 4th DCA 1983); *Margolin v. Morton F. Plant Hospital Assoc.*, 348 So.2d 57 (Fla. 2d DCA 1977). These procedures must in turn satisfy the requirements of the Joint Commission on Accreditation of Hospitals. Sarasota Memorial Hospital's Medical Staff By-Laws in turn incorporate by reference the ethical principles of the American Medical Association, which, *inter alia*, require that a physician be given an opportunity to be present *whenever* physicians are deliberating on his privileges.

These requirements are imposed as a matter of State law and as a matter of federal law, congnizable under the Fourteenth Amendment to the U.S. Constitution. *See Northeast Georgia Radiological Associates, P.C. v. Tidwell*, 670 F.2d 507 (5th Cir. 1982) (radiologist had constitutionally protected property interest in staff privileges); *Shaw v. Hospital Authority of Cobb County*, 507 F.2d 625, 628 (5th Cir. 1975) (admission to medical staff invokes liberty interests under Fourteenth Amendment); *see also American Druggists Ins. Co. v. Bogart*, 707 F.2d 1229 (11th Cir. 1983) (government rules

and regulations for determining rights not otherwise cognizable under federal law create federally protected right to compliance with those rules and regulations); *see generally* Cray, "Due Process Considerations in Hospital Staff Privileges Cases," 7 Hastings Con.L.Q. 217 (1979).

Sarasota Memorial Hospital's Medical Staff By-Laws on their face do not afford due process as required by Florida law and the Fourteenth Amendment. The Hospital Board's erroneous interpretation of those By-Laws exacerbate the inherent due process violations. And, the Hospital Board in this matter has egregiously ignored and violated even its own inadequate standards and procedures.

The By-Laws provide for all privilege decisions to originate within the respective sections (here, the Medical Section, in accordance with it (sic) own rules and regulations), and to go eventually to the Executive Committee for its recommendation to the Hospital Board. By incorporation of the A.M.A. Ethics, all proceedings before those committees are to be open to the affected physician. That was not done here. The affected physician is then given a right of "appeal," first before the Executive Committee and then before the Hospital Board, with specified available procedures. However, at those so-called "due process hearings," the affected physician bears the burden of establishing not merely that he is qualified or that the adverse recommendation is wrong, but that "the charges or grounds involved lack any factual basis or that such basis or any action based thereon is either arbitrary, unreasonable, or capricious."

As they did in the proceedings involved in Case No. 83-1534-CA-01, the Medical Staff committees heaped error on error by interpreting the rules to permit them to present new evidence at the so called "due process hearings" — evidence which was not ever received, considered, or relied upon by the committees (sic) meeting in closed session. And,

Dr. El Shahawy was never given notice of this evidence. Regardless of how well Dr. El Shahawy may have been able to demonstrate that the lower committees had no factual basis for their recommendations, he plainly could not reasonably be required to meet this burden as to new evidence of which he had no notice whatever. For the opportunity to be heard and at an administrative proceding (sic) to be meaningful (and constitutionally sufficient), the degree of proof required when rights are adjudicated must be a "preponderance (sic) of the evidence." *See Florida Dept. of Transportation v. J.W.C. Co.*, 396 So.2d 778, 789 (Fla 1st DCA 1981); *Fitzpatrick v. City of Miami Beach*, 328 So.2d 578, 579 (Fla. 3d DCA 1976); *Florida Dept. of H.R.S. v. Career Serv. Commission, Dept. of Admin.*, 289 So.2d 412, 415 (Fla. 4th DCA 1974); *Hollywood Jaycees v. State Dept. of Rev.*, 306 So.2d 109, 112 (Fla. 19), *General Dev. Utilities, Inc. v. Florida Dept. of Environmental Regulation*, 417 So.2d 1068, 1070 (Fla. 1st DCA 1972).

The volumenous (sic) appendix to this petition repeatedly demonstrates the egregious due process violations. The Chief-of-Staff's original, unilateral summary suspension of Dr. El Shahawy's Swan-Ganz privileges was directly contrary to the By-Laws. It was based on perjured testimony and guided through a series of hand-picked committees with but one clear purpose — to destroy Dr. El Shahawy by whatever means were considered necessary.

Meanwhile, the Hospital Board had retained special counsel (well before "deciding" to consider suspending Dr. El Shahawy's staff privileges) to remove Dr. El Shahawy from the Medical Staff altogether, ignoring the due process requirements of federal and state law, the Government-in-the-Sunshine Law, and the Medical Staff's own By-Laws. Dr. El Shahawy was *never once afforded an opportunity to appear*

before a medical committee on the question of his medical staff privileges. Instead, the Executive Committee secretly deleted Dr. El Shahawy's name from the list of physicians eligible for staff renewal, and the Hospital Board, after extensive consultation with retained counsel, voted itself to hold a hearing to suspend Dr. El Shahawy's privileges.

The Hospital Board purported to base its suspension of Dr. El Shahawy's privileges on alleged "disruptive behavior" and clinical incompetence. The allegations of disruptive behavior are scurrilous and nothing more than an impermissable retaliation for Dr. El Shahawy's exercise of his First Amendment rights of free speach (sic) and to petition for redress of grievances.

The so-called "evidence" of Dr. El Shahawy's clinical incompetence was based on the testimony of incompetent witnesses, technicians and nurses in no conceivable position to judge Dr. El Shahawy's abilities. The actual medical records conclusively rebut the witnesses on every key point. The first procedure supposedly took too long; the records and patient's own testimony show otherwise. The other procedure supposedly resulted in an excessive loss of two quarts of blood. The vital signs records show no worsening of the pulse rate or blood pressure — which is absolutely inconsistent with any significant blood loss. Whether motivated by their own personalities or fallen prey to certain physicians intent on retaliating for Dr. El Shahawy's litigation, the testimony was demonstrably false.

Those sitting in judgment of Dr. El Shahawy's credentials were in no sense impartial, but were instead persons who, by being named defendants in Dr. El Shahawy's suits or otherwise, were determined to crush him into the ground for daring to challenge their tight-knit and exclusive community (*i.e.*, his alleged disruption). The Hospital Board refused to give Dr. El Shahawy adequate specification of the charges against him

and the documentation relied on for and necessary to rebut those charges. Because of the Hospital Board's failure to provide this information, Dr. El Shahawy had inadequate time and opportunity to prepare to rebut this testimony. The Hospital Board then further contributed to the hysteria engendered by their tactics by stationing police officers at the hearing, completing the transformation of what was supposed to be an impartial peer review into an inquisition.

B. *The Hospital Board Departed From The Essential Requirements of Law*

Fla.Stat. §§395.011 and 395.0115 require standards and procedures on all privilege questions "predicated on fairness of hearing and appellate review mechanisms." *Carida v. Holy Cross Hosp., Inc.*, 427 So.2d 803 (Fla. 4th DCA 1983); *see also Palm Beach-Martin County Medical Center, Inc. v. Panero,* 431 So.2d 1023 (Fla. 4th DCA 1983); *Margolin v. Morton F. Plant Hosp. Accoc'n,* 348 So. 2d 57 (Fla. 2d 1977).

As is demonstrated above (and, more fully, in the appendix), the Hospital Board and the Medical Staff repeatedly, substantially, and egregiously departed from their own By-Laws, which themselves depart from Chapter 395. The Hospital Board therefore departed from the essential requirements of law. The Hospital Board's decisions must therefore be quashed.

C. *There Is No Competent Substantial Evidence To Sustain the Hospital Board's Decisions*

As held in *Deerfield Beach,* this Court must determine whether there is "competent substantial evidence" to support the Hospital Board's findings. *See e.g., Duval Utility Co. v. Florida Public Service Commission,* 380 So.2d 1028, 1031

(Fla. 1980):

> Competent substantial evidence is 'such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred or such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.'

See also Florida Rate Conference v. Florida Road and Public Utilities, 108 So.2d 601 (Fla. 1959).

There is no basis in fact whatever for the Hospital Board's suspension of Dr. El Shahawy's Swan-Ganz and medical staff privileges.

First, the Hospital Board impermissably relied on ancient history. The Hospital Board had renewed Dr. El Shahawy's medical staff privileges in October, 1982. The Board should plainly be estopped from going behind that date now to try to drag out incriminating evidence (obviously motivated by nothing other than Dr. El Shahawy's litigation).

Nevertheless, the "evidence" the Board purported to rely on from prior to October, 1982, was without substance. The Board attempted to demonstrate three instances of "inappropriate consultation" by Dr. El Shahawy in 1980 and 1981. The transcrpt (sic) demonstrates, however, that this clearly was not the case.

Nurses and technicians were permitted to testify about prior procedures performed by Dr. El Shahawy. But, as the medical records submitted to the Board demonstrate, those individuals *were not even present* for the procedures they purport to describe.

The Board then attempted to inpugn Dr. El Shahawy's performance of two specific Swan-Ganz procedures (in December, 1982 and April, 1983) by the testimony of techni-

cians. Their testimony is completely contradicted, however, by the medical records themselves and by the testimonies of the patients themselves.

Dr. El Shahawy's credentials and expertise exceed those of any cardiologist on the staff at Sarasota Memorial. The only physicians who had observed Dr. El Shahawy attested to his excellence. And Dr. El Shahawy proved that the Board had ignored proper standards in giving his protagonists privileges, plainly demonstrating the arbitrary and capricious nature of the Board's decision.

Not only has no (sic) patient suffered at Dr. El Shahawy's hands, his patients have received outstanding care. Apparently, some members of the medical staff did not like it when Dr. El Shahawy challenged their attempts to maintain the cardiac catheterization laboratory as the enclave of the chosen few (at the expense of the Sarasota community) and refused to have his rights trampled on. But that cannot suffice to ruin a man's livelihood and to deny this community quality health care. There is no "substantial, competent evidence" to support the Board's decision.

CONCLUSION

The Hospital Board has violated every possible provision of the By-Laws, and has trampled Dr. El Shahawy's rights to due process. Its decisions, and the methods by which it reached those decisions, depart from the essential requirements of law.

The Board, mired in the petty politics among some members of its medical staff and angered by Dr. El Shahawy's litigation, has tried to destroy Dr. El Shahawy's livelihood. Sarasota Memorial has the only emergency room, the only catheterization laboratory, and the only cardiac surgery in town. The Board has denied those facilities to Dr. El Shahawy's patients and have deprived the other tax-paying

citizens of his unequalled expertise. Such abuse of power should not be sanctioned.

Dr. El Shahawy would respectfully submit that his qualifications are established beyond dispute.

WHEREFORE, Petitioner prays for a writ of certiorari or other appropriate relief reinstating his privileges.

Respectfully submitted,

BAILEY & DAWES,
a professional association
1820 One Biscayne Tower
Two South Biscayne Boulevard
Miami, Flordia 33130
(305) 374-5505

By /S/
Guy B. Bailey, Jr.

And

By /S/
Jesse C. Jones

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petition and of the Appendix thereto were mailed to Sarasota County Public Hospital Board, 1901 Arlington Street, Sarasota, Florida, this 10th day of January, 1984.

/S/
Of Counsel

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR SARASOTA COUNTY, FLORIDA
CASE NO.: 84-115 CA 01
DIVISION: P

MAHFOUZ EL SHAHAWY, M.D., etc.,

Petitioner,

vs.

SARASOTA COUNTY PUBLIC HOSPITAL BOARD, a body corporate,

Respondent.

_____ /

ORDER TO SHOW CAUSE

THIS CAUSE came before the Court on the within Petition for Certiorari filed by Mahfouz El Shahawy, M.D. against the Sarasota County Public Hospital Board, and the Court having considered same and being advised in the premises, it is, therefore,

ORDERED AND ADJUDGED that the Respondent, Sarasota County Public Hospital Board, is directed to show cause, in writing, within 30 days of this Order, why relief should not be granted.

DONE AND ORDERED in Chambers, at Sarasota, Sarasota County, Florida, this 30th day of Jan., 1984.

/s/
CIRCUIT COURT JUDGE

Copies Furnished to:
Guy B. Bailey, Jr., Esquire
Mr. H. J. Boyd
Executive Director
Sarasota County Public Hospital

IN THE CIRCUIT COURT FOR SARASOTA COUNTY, FLORIDA

MAHFOUZ EL SHAHAWY, Petitioner,	)	CASE NO. 84-115-CA-01
-vs-	)	and
SARASOTA COUNTY PUBLIC HOSPITAL BOARD, Respondent.	)	CASE NO. 83-1534-CA-01

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent Sarasota County Public Hospital Board (the Board) submits the following reponse to the petition for common law writ of certiorari in Case No. 84-115 by which petitioner Mahfouz El Shahawy seeks judicial review of the action of the Board denying him reappointment to the medical staff of Sarasota Memorial Hospital (the Hospital) and also suspending Dr. Shahawy's clinical privileges to perform Swan-Ganz catheterization procedures.

To simplify the court's analysis of the issues in this case, this response discusses the non-reappointment to the medical staff as a separate proceeding from the suspension of Swan-Ganz clinical privileges. They were initiated as separate matters and processed by committees separately until the Board hearing. The Board's position in this response is that the evidence as to Dr. Shahawy's disruptive behavior justifies his non-reappointment to the staff, without regard to his Swan-Ganz incompetence. If the court agrees with the Board's position, the judicial review of suspension of Swan-Ganz privileges becomes moot. Nevertheless, we are not waiving the position that non-reappointment to the staff is supported by substantial evidence as to disruptive behavior and clinical incompetence combined (or each considered separately). The

notification of issues for the Board hearing concerning non-reappointment to the staff combined disruptive behavior with lack of manual dexterity in invasive procedures, App. 751, and the Board's conclusion following the hearing stated that the decision to deny Dr. Shahawy's application for reappointment was reached after considering all the evidence and in the light of all the findings of fact. App. 1593.

This present case was consolidated with pending Case No. 83-1534 CA-01 in this court, *Shahawy v. Sarasota County Public Hospital Board,* a similar petition for common law certiorari to review a prior action by the Board denying Dr. Shahawy's application for clinical privileges in the cardiac catheterization laboratory (the cath lab) at the Hospital, by order of this court dated February 13, 1984.

In both cases, the ultimate legal issues are the same: whether the Board accorded Dr. Shahawy procedural due process, whether the Board observed the essential requirements of the law, and whether the Board's findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982); *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957).

If the court sustains the Board's denial of reappointment of Dr. Shahawy to the Hospital staff, then of course Case No. 83-1534 will become moot and the petition in that earlier case presumably will be dismissed. If the court determines that it should decide Case No. 83-1534 on its merits, we refer the court to the Board's Response in that case, filed July 15, 1983, as to the substantial evidence issue. As to the issues of procedural due process and essential requirements of law, we rely on the discussion of those issues in the July 15, 1983 Response and also this Response because of the similarity of the contentions of petitioner in both cases.

In each case the appendix to the petition is voluminous.

Following "investigation" by Medical Staff committees, the Board conducted a lengthy *de novo* hearing and made its own findings of fact on which it based the final decision. This response will point out specific portions of the appendix in Case No. 84-115 which demonstrate that the Board's decision was reached with great care and on the basis of credible objective evidence.[1]

I. RESPONSIBILITY OF HOSPITAL BOARD

The hospital governing board bears the ultimate legal responsibility for the quality of care in the hospital and, correspondingly, for the qualifications of physicians who are admitted to practice in its facility. That responsibility is demonstrated in every case which has addressed the question.

In a Nevada case, *Moore v. Board of Trustees of Carson-Tahoe Hospital,* 495 P.2d 605 (Nev. 1972), the Board of Trustees terminated a physician's clinical privileges because of his failure to comply with the medical staff bylaws. The physician sued, asking the court to reinstate him. The court refused and stated in part:

> Today, in response to demands of the public, the hospital is becoming a community health center. The purpose of the community hospital is to provide patient care of the highest possible quality. To implement this duty of providing competent medical care to the patients, it is the responsibility of the institution to create a workable system whereby the medical staff of the hospital continually reviews and evaluates

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[1]References to the petition in Case No. 84-115 are shown: Pet. (page number). Documents in the appendix in Case No. 84-115 are cited: App. (page number).

> the quality of care being rendered within the institution. The staff must be organized with a proper structure to carry out the role delegated to it by the governing body.
>
> All powers of the medical staff flow from the Board of Trustees, and staff must be held accountable for its control of quality. The concept of corporate responsibility for the quality of medical care was forceably advanced in *Darling v. Charleston Community Memorial Hospital,* 33 Ill. 2d 326, 211 N.E.2d 253 (1965), wherein the Illinois Supreme Court held that hospitals and their governing bodies may be held liable for injuries resulting from imprudent or careless supervision of members of their medical staffs. The role of the hospital vis-a-vis the community is changing rapidly. The hospital's role is no longer limited to the furnishing of physical facilities and equipment where a physician treats his private patients and practices his profession in his own individualized manner. The right to enjoy medical staff privileges in a community hospital is not an absolute right, but rather is subject to the reasonable rules and regulations of the hospital. Licensing, *per se,* furnishes no continuing control with respect to a physician's professional competence and therefore does not assure the public of quality patient care. The protection of the public must come from so other authority, and that in this case is the hospital board of trustees. The board, of course, may not act arbitrarily or unreasonably in such cases. The board's actions must also be predicated upon a reasonable standard.

In so holding, the court made a point that is equally applicable to Florida and to Sarasota Memorial Hospital: The hospital will be held liable if any patient suffers an injury because of (1) failure to have appropriate procedures to review a physician's qualifications, (2) failure to follow such

procedures, or (3) otherwise allowing an unqualified physician to practice in the hospital. That legal principle is known as corporate liability and is the law of Florida as well as every other state where the issue has been raised. Florida's regulations pertaining to hospital licensure incorporate this principle:

> *Governing Authority:* The hospital organization shall have an effective governing authority responsible for the legal and moral conduct of the hospital as a functioning institution. Rules of the Department of Health and Rehabilitative Service, health programs, Chapter 10 D- 28.56.

That principle was emphasized in a recent Florida case, *Maxey v. Martin Memorial Hospital Association, Inc.*, No. 82-330-Ca, Florida 19th Jud. Cir. (May 24, 1983). At issue in that case was whether a Florida hospital could deny a physician's request for clinical privileges because he failed to comply with the hospital rule that all physicians must carry malpractice insurance. The court upheld the hospital's authority to do so stating:

> Members of the hospital's medical staff are not employess of th hospital. The significance of being a member of the hospital's medical staff is that the physician is permitted to admit and treat his patients in the hospital to the extent that his clinical privileges are appoved by the hospital's board of directors. The ultimate responsibility for determining when a physician should be admitted to or discharged from the hospital's medical staff rests with this board as well.... Applying the uncontroverted facts on the record to the issue before this court. it appears that responsibility for the overall operation of the hospital rests with the hospital's board of directors....

Two other leading cases in this area are *Johnson v. Misericordia Community Hospital,* 301 N.W.2d 156 (Wis. 1981), and *Elam v. College Park Hospital,* 183 Cal.Rptr. 156 (Cal. App. 1982).

At Sarasota Memorial Hospital, the Board is authorized by its Enabling Act to grant or revoke staff membership and clincal privileges "so that the welfare and health of patients and the best interests of the hospital may, at all times, be best served." App. 55. Identical statutory language has been held to provide a hospital board with discretionary power to suspend medical staff members in accordance with its internal rules and subject to judicial review as to reasonableness. *North Broward Hospital District v. Mizell,* 148 So. 2d 1 (Fla. 1962).

That authority is implemented in the bylaws of the Medical Staff of Sarasota Memorial Hospital (the bylaws).[2] Article VII, section 1, provides that whenever the activities or professional conduct of a physician "are considered to be lower than the standards or aims of the Medical Staff or to be disruptive to the operations of the hospital," the physician may be suspended from the staff or his pertinent clinical privileges may be suspended. App. 12. Procedural rights are provided in Article VIII. App. 17-19.

We are not aware of any Florida opinion dealing with disruptive behavior as a reason for removal from staff membership. However, this is authorized in Florida Statutes, Sections 395.011(3) (1982) and 395.0115 (1) (1982), and has

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2 Although these are the bylaws of the Medical Staff, they were approved by the Board and are regarded as being binding on the Board.

been upheld by courts in a number of other states.[3]

The petition does not challenge Article VII of the bylaws. Instead it states, "The allegations of disruptive behavior are scurrilous and nothing more than an impermissable retaliation for Dr. El Shahawy's exercise of his First Amendment right of free speach (sic) and to petition for redress of grievances." Pet. 10. That contention is, of course, demolished by the findings and evidence summarized at pages 22-29, *infra.* Interruption of medical staff committee meetings, and threats and harrassment of staff physicians apart from litigation itself, are not within the ambit of constitutionally protected free speech.

II. CARDIAC CATHETERIZATION

These two case involve two different types of cardiac catheterization. Case No. 83-1534 involves clinical privileges in the cath lab. Case No. 84-115 involves clinical privileges to perform Swan-Ganz procedures. The purpose of both types is to provide diagnostic information about suspected coronary artery problems; catheterization is not a routine part of a cardiac examination.

A cardiac catheterization laboratory is a comparatively recent addition to hospital facilities. it contains complicated

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3A few of the cases in which disruptive behavior was held to be adequate as a sole ground for suspension are *Leonard v. Board of Directors Prowers City Hospital District,* 673 P.2d 1019 (Colo. App. 1983); *Hodges v. Arlington Neuropsychiatric Center, Inc.,* 628 S.W. 2d 536 (Texas App. 1982); *Yarnell v. Sisters of Saint Francis Health Sisters,* 446 N.E. 2d (Ind. App. 1983); *Ladenheim v. Union County Hospital District,* 76 Ill. App. 3d 90, 394 N.E.2d 770 (Ill. App. 5th 1979); *Huffaker v. Bailey,* 540 P.2d 1398 (Or. 1975); *Robbins v. Ong,* 452 F. Supp. 110 (S.D. Ga. 1978).

and expensive radiologic equipment, costing a half-million dollars or more.[4] Catheters are introduced into the arteries and veins lying just below the skin near the elbow and frequently near the groin. Each catheter is advanced through the blood vessels toward the chest, into the large central vessels, and finally into the interior of the heart whereupon various measurements are made.

There is a distinction between left-side heart catheterization and right-side catheterization. Use of the cath lab is necessary for the former but not always for the latter.

One form of right side catheterization, referred to in this case as the Swan-Ganz procedure, does not require utilization of the cath lab and is frequently performed in the patient's room. Dr. Shahawy has been performing Swan-Ganz procedures at the Hospital but has not been permitted to utilize the cath lab. Since catheterization is an "invasive" procedure, incompetent performance presents a potential danger to the patient. App. 1166, 1355.

III. RELATED LITIGATION

Dr. Shahawy's efforts to obtain clinical privileges in the cath lab have led him to institute a considerable volume of litigation prior to the present case.

In 1980, Dr. Shahawy's application for clinical privileges

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[4]The description of catheterization equipment and procedures are the quotations as to the importance of proficiency are derived from D. Leon, "The Annual Checkup" in *Heartbook* 113, 124-126 (Amer. Heart Assoc., pub. 1980); F. Soues, Jr., "Coronary Cinearteriography" in *The Heart* 377, 377-86 (3d ed. J. Hurst 1974); S. King III & J. Douglass, "Coronary Arteriography and Left Ventriculography" in *The Heart* 397, 397-416 (4th ed. J. Hurst 1978).

in the cath lab was denied by the Board. At that time Dr. Shahawy was not board certified and thus did not qualify under Board criteria. That action by the Board was upheld on judicial review. *See Sarasota County Public Hospital Board v . Shahawy,* 408 So. 2d 644 (Fla. 2d DCA 1982).

Since that earlier case, Dr. Shahawy became board certified and reapplied. Again his application was denied and he is seeking judicial review in Case No. 83-1534, which involves different criteria from the 1980 case.

Related litigation in addition to the 1980 case and the two cases pending in this court includes the following:

1. *Shahawy v. Elliott,* U.S. District Court, Middle District of Florida, No. 81-545-Civ.-T-WC. Complaint alleged defamation, libel and slander, and interference with business relationship arising out of letter and testimony by Dr. Elliott at 1980 Board hearing on Dr. Shahawy's application for cath lab privileges. Judgment fo Dr. Elliott; affirmed per curiam by Eleventh Circuit.

2. *Shahawy v. Cooper,* Circuit Court for Alachua County, Florida, No. 81-1308-CA. Complaint alledged slander, libel, negligence, and interference with a business relationship arising out of Dr. Cooper's testimony at the same 1980 board hearing. Case is still in discovery.

3. *Shahawy v. Sarasota County Public Hospital Board,* Circuit Court for Sarasota County, Florida, No. 80-3740. Complaint names as defendants, Sarasota County Public Hospital Board; F. Edward Rushton, M.D.; John N. Carlson, M.D.; William L. Page, M.D.; and James Tollerton, and alleged conspiracy among doctors and Board chairman to interfere with business relationship and to violate Florida antitrust laws; violation by Executive Committee of Florida sunshine laws; promissory estoppel against Executive Committee. Voluntarily dismissed prior to answers.

4. *Shahawy v. Harrison,* U.S. District Court, Middle District of Florida, No. 82-1207-Civ-T-WC. Complaint named as defendants, William T. Harrison, Jr.; F. Edward Rushton, M.D.; John N. Carlson, M.D.; William L. Page, M.D.; Richard J. Sarkis, M.D.; Marc Silverstein, M.D.; David J. Stutz, M.D.; Ponnuswamy Natarajan, M.D.; James Tollerton; David Bowman; A. Lamar Matthews, Jr.; Charles Mathews, M.D.; Eugene Myers, M.D.; Patrick R. Del Mastro, M.D.; John Chidsey, M.D.; Bruce Fleegler, M.D.; H. J. Floyd; I. J. Rand; C. Ted French; Sarasota County Public Hospital Board; an John Does I - X, and alleged numerous unlawful acts arising out of the processing of Dr. Shahawy's prior application. Complaint dismissed April 29, 1983 for lack of subject matter jurisdiction and failure to state a claim. Amended complaint filed May 18, 1983 and dismissed October 13, 1983; appeal pending before Eleventh Circuit.

No one questions the propriety of obtaining judicial review of the Board's denial of applications for clinical privileges. On the other hand, it is inevitable that the Hospital staff would be disrupted by the other suits against witnesses at Board hearings, physicians active on Medical Staff committees, Board members and the Board's attorney.

IV. THE STANDARD OF REVIEW

It is undisputed in this case that the standard of review for a common law petition for certiorari is that this court is limited to determining "whether procedural due process was accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence." *City of Deerfield Beach,* 419 So. 2d at 626.

A. THE REVIEWING COURT CONSIDERS ONLY THE ADMINISTRATIVE RECORD.

In *DeGroot*, 95 So. 2d at 916, the Florida Supreme Court stated:

> The appellate court merely examines the record made below to determine whether the lower tribunal had before it competent substantial evidence to support its findings and judgment which also must accord with the essential requirements of the law. It is clear that certiorari is in the nature of an appellate process. It is a method of obtaining review, as contrasted to a collateral assault.

This quoted language was relied upon in a subsequent Florida Supreme Court decision in which the court reviewed the authorities and reiterated the "well established rule" that "the reviewing court's consideration shall be confined strictly and solely to the record of proceedings by the agency or board on which the questioned order is based." *Dade County v. Marca*, 326 So. 2d 183, 184 (Fla. 1976).

B. THE REVIEWING COURT WILL NOT WEIGH CONFLICTING EVIDENCE.

The *DeGroot* opinion states:

> In certiorari the reviewing court will not undertake to re-weigh or evaluate the evidence presented before the tribunal or agency whose order is under examination.

95 So. 2d at 916. This principle was applied in a hospital staff privileges case in *Mizell v. North Broward Hospital District*, 175 So. 2d 583, 585-86 (Fla. 2d DCA 1965):

> In light of this testimony, we are concerned that there

> was competent substantial evidence before the board which supported its findings of fact. In petitions for certiorari, this is the limit of a court's power to review. *Osceola Fruit Distributors v. Mayo,* Fla. App. 1959, 115 So. 2d 760. Where findings of fact by an administrative agency are supported by theevidence, the court cannot substitute its own findings. *Great Southern Trucking Co. v. Mack,* Fla. 1951, 54 So. 2d 153, and 1 Fla. Jur., Administrative Law, Sec. 192.

The Florida Supreme Court has expressly pointed out that in a certiorari proceeding a circuit court "may not . . . substitute its judgment as to the credibility of witnesses for that of the body charged with the duty of determining the facts." *City of Pensacola v. Maxwell,* 49 So. 2d 527, 528 (Fla. 1950).

In addition, both federal and state courts have long recognized the need for considerable deference with respect to the good faith decision of a hospital governing board concerning staff privileges. The Fifth Circuit Court of Appeals, in oft-quoted language, remarked:

> In the instant case there was considerable evidence regarding Dr. Sosa's ethical and professional competency. No court should substitute its evaluation of such matters for that of the Hospital Board. It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The Board has chosen to rely on the advice of its Medical Staff, and the court cannot surrogate for the Staff in executing this responsibility. Human lives are at stake, and the governing board must be given discretion in its selection so that it can have confidence in the competence and moral commitment of its staff. The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers,

> subject only to limited judicial surveillance. The court is charged with the narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered.
>
> In short, so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere. Courts must not attempt to take on the escutchen of Caduceus.

Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173, 177 (5th Cir. 1971).

And in our state, in the prior case involving the same hospital and the same petitioner as this case:

> Florida law has afforded great discretion to hospital boards in granting or denying privileges at their facilities under criteria which they have formulated. Usually, the hospital's discretion is limited only by the consitutional requirement that the standards for the privileges be reasonably related to furthering the goal of providing high quality patient care, that the power of the hospital not be exercised in an unreasonable arbitrary and capricious manner and that the decisions of the hospital be subject to judicial review.

Sarasota County Public Hospital Board v. Shahawy, 408 So. 2d 644, 647 (Fla. 2d DCA 1982) (citations omitted).

C. THE BOARD'S DECISION IS ENTITLED TO A PRESUMPTION OF CORRECTNESS.

Inasmuch as there is competent substantial evidence to support the Board's conclusion, as is demonstrated hereinafter, the Board is entitled to a presumption that its

decision was legally correct. *State ex. rel. Siegendorf v. Stone*, 266 So. 2d 345, 346 (Fla. 1972). While that presumption can be rebutted by a showing of "compelling circumstances, clear error or overriding legal basis which would indicate overruling the administrator's decision," *Id.*, the burden of establishing such major error is on the petitioner in a certiorari proceeding, *Benton Bros. Film Exp. v. Florida Railroad Public Utilities Commission*, 57 So. 2d 435, 437 (Fla. 1952). In this action petitioner has made no such showing. *See also Dance v. North Broward Hospital District*, 420 So. 2d 315 (Fla. 2d DCA 1982).

V. ARGUMENT - NON-REAPPOINTMENT TO MEDICAL STAFF

The bylaws contain two separate procedures which may result in termination of a physician's staff membership. Because of a time coincidence, both procedures were followed with respect to Dr. Shahawy.

The Board has the sole authority to appoint or reappoint physicians to the Medical Staff or to suspend appointments. Once a year the performance of each physician is reviewed by the Credentials Committee and a recommendation is made to the Executive Committee. That committee in turn submits a recommendation to the Board. App. 971-2. If the Executive Committee recommendation is adverse, the physician is entitled, at his election, to a "due process" hearing before the Executive Committee. If the recommendation is still adverse, the physician is entitled to a hearing by the Board. By-laws art. V, secs, 2,3; App. 8-11.

The Medical Privileges Committee recommended that Dr. Shahawy not be reappointed. That recommendation was approved by the Credentials Committee and the Executive Committee, and the Board was so notified pursuant to its

July 7, 1983 resolution. App. 95-97. On August 31, 1983, Dr. Shahawy's counsel was notified of these actions and that the two recommendations, (1) suspension of Dr. Shahawy's clinical privileges to perform Swan-Ganz procedures, and (2) denial of reappointment, would be heard together by the board. App. 739. Dr. Shahawy was sent the same notice on September 2, 1983. App. 740. Though Dr. Shahawy objected to that procedure, he did not request a hearing before the Executive Committee to which he now seems to be claiming entitlement. Instead he demanded a hearing before an ad hoc committee of independent medical consultants. App. 753. Neither the bylaws nor common law principles of procedural fairness require (or permit) such an outside committee procedure.

In the alternative, the Board (or others) may request suspension of staff membership, by recommendation to the Executive Committee. That committee forwards the request to the chief of the Medical Section, who appoints an ad hoc committee to investigate the request. The physician is given an opportunity for an interview (not a hearing) with the ad hoc committee. If the Medical Section report is unfavorable, the physician may appear (again not a hearing) before the Executive Committee. If the recommendation of the Executive Committee is unfavorable, the physician is entitled to a "due process" hearing, at his election, before the Executive Committee and/or the Board. Bylaws art. VII, sec. 1; App. 12-14.

With respect to Dr. Shahawy, the Board adopted on July 7, 1983 a resolution initiating the suspension procedure. App. 57. Dr. Shahawy was notified of the resolution. App. 721. This action was partly in response to Dr. Shahawy's letter to the chairman of the Board dated June 20, 1983, urging the Board to "exercise their power immediately" and take action with respect to the Swan-Ganz privileges. App. 342. Dr. Shahawy did not request a "due process" hearing before the

Executive Committee with respect to either the non-reappointment recommendation or the Board's suspension resolution of July 7, 1983.

In accordance with that resolution, the Board held a lengthy *de novo* hearing on October 24, 25 and 26, 1983. Transcript App. 796-1580. Special counsel for the Hospital presented sixteen witnesses and eighty-four documents. Counsel for Dr. Shahawy presented six witnesses and one document. All this testimony was under oath. Cross examination of witnesses was permitted with great lattitude. Board members asked a great many questions of witnesses for both sides.

Notice of the hearing, including procedure and grounds and specifications, was sent to Dr. Shahawy on September 2, 1983. App. 740 et seq.; Attachment 1 to this Response. The hearing was postponed some six weeks at the request of Dr. Shahawy. Following the hearing, the Board issued detailed findings of fact and concluded that reappointment should be denied. App. 1588 et seq.; Attachment 2 to this Response.

Although not contemplated by the bylaws, Dr. Shahawy was permitted to appeal the Board's decision. App. 1587. The appeal hearing was held December 12, 1983. Transcript App. 1595-1647. Additional medical records offered by Dr. Shahawy were received into evidence. The prior decision of the Board was affirmed. App. 1784-5.

A. THERE WAS NO DENIAL OF PROCEDURAL DUE PROCESS.

The basic elements of procedural due process are notice and an opportunity to be heard, to be measured "as the particular situation demands" according to the facts of the individual case. *Hadley v. Dept. of Administration*, 411 So. 2d 184, 187 (Fla. 1982), quoting *Matthews v. Eldridge*, 424

U.S. 319, 334 (1976).

One case, *Christhilf v. Annapolis Emergency Hospital Association, Inc.*, 496 F.2d 174 (4th Cir. 1974), has outlined at 178, 179 the "steps" procedural due process requires in a hospital medical staff hearing. Those steps are:

(1) Reasonable notice of the charge;
(2) Adequate time to prepare his case;
(3) The right to present evidence in his behalf;
(4) The right to rebut evidence against him; and
(5) The right of cross-examination.

Those requirements will be discussed individually here.

(1) *Reasonable notice of the charges.*

On September 2, 1983, Dr. Shahawy received reasonable notice of the charges. App. 743-751. That notice was a nine page document captioned "Notice of Facts That Require Termination of Medical Staff Appointment and Clinical Privileges." It cited grounds and specifications detailing alleged incidents of disruptive behavior as well as individual instances of patient care which were in question. It was that document that formed the basis for the hearing and outlined the evidence that would be presented to the Board. Although it is part of the appendix, it is also attached hereto as Attachment 1. Even this adequate notice was amplified by a set of documents that were sent to Dr. Shahawy more than a month before the hearing. App. 765. Dr. Shahawy of course had personal knowledge of his actions mentioned in the notice and the documents.

(2) *Adequate time to prepare his case.*

The hearing requested by Dr. Shahawy was originally scheduled to be held on September 12, 1983. It was postponed twice at Dr. Shahawy's request to permit him time

to retain new counsel and to prepare for the hearing. It was postponed originally until September 25, 1983. It was finally convened on October 24, 1983, seven weeks after Dr. Shahawy received notice of the charges and five weeks after he received copies of all of the documents that were to be admitted as evidence for consideration by the board.

(3) *The right to present evidence in his behalf.*

The hearing consumed three full evenings, October 24, 25, 26, 1983. Dr. Shahawy and his counsel were permitted as much time as they chose to present evidence. All evidence they sought to admit was accepted by the board. Dr. Shahawy's counsel presented six witnesses including Dr. Shahawy, marked seven exhibits and offered one exhibit into evidence. In addition, prior to the hearing Board members were sent numerous letters from Dr. Shahawy making strong objections to various procedures and accusing various individuals of bias and unfairness. App. 118, 123, 131, 132, 182 340, 347. The board thus considered, and rejected, the arguments of procedural unfairness which are presented by the petition. Finding 4(g) App. 1591. Dr. Shahawy was heard in two ways: first, through the letters, and second, through presenting his own witnesses and cross-examination of adverse witnesses.

(4) *The right to rebut evidence against him.*

Well in advance of the hearing, Dr. Shahawy was apprised of *all* of the written evidence to be presented at the hearing. All of the documents that were introduced in evidence at the hearing were provided to Dr. Shahawy by September 23. App. 765, 771. Although neither the bylaws nor procedural due process requires a physician to be provided a witness list in advance of the hearing, the witness list was

available to Dr. Shahawy on the condition that Dr. Shahawy would agree to refrain from contacting those individuals for the purposes of intimidation or harassment. App. 766. Dr. Shahawy never agreed to that condition.

(5) *The right of cross-examination.*

Special counsel for the hospital presented sixteen witnesses at the hearing. Dr. Shahawy's counsel had the opportunity to cross-examine each and did cross-examine each. The transcript of the hearing which is before this court adequately demonstrates that.

That strong showing is not overcome by the arguments in the petition:

1. *Hearing before Medical Staff Committee.*

The petition contends that Dr. Shahawy was never given any hearing before any Medical Staff committee, and that this was contrary to express requirements of the bylaws and Florida statutes. Pet. 6, 10.

The short answer is that Dr. Shahawy did not request such a hearing by the Executive Committee. Medical Staff committees has an input and presented their recommendations to the Board. A formal hearing is not mandatory if not requested. A physician may waive a formal hearing, which the Board found to have occurred here. App. 1589. Dr. Shahawy is no stranger to the hearing procedures at the Hospital.

Before the Executive Committee considered the nonreappointment recommendation, the Board had already announced it would hold a "full and fair" hearing. When there is an adequate *de novo* hearing, as occurred here, it is "immaterial what errors or irregularities or invasion of constitutional rights took place in the initial proceedings." 2 Am.Jur. 2d, Administrative Law, sec. 698, p. 597 (1962).

2. *Presence at Committee Deliberations*

The petition contends that every meeting of every committee must be open to the affected physician because the bylaws incorporate by reference the ethical principles of the American Medical Association. [5] Pet. 8-9.

The quoted language applies only to a *decisional* hearing by a governing body or a committee of physicians, not to committee meetings leading only to recommendations. In this case, none of the Medical Staff committees was a "hearing body". The committee meetings did not "deprive" Dr. Shahawy of "valuable property rights."

It would be nonsense to require each committee, one after another, to repeat the elaborate procedures specified in the AMA principles.

This identical agrument has been carefully considered and rejected by the Supreme Court of Iowa in a physician suspension case:

> [P]laintiff directs our attention primarily toward the

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[5]The pertinent AMA language, quoted in Case No. 83-1534, Petitioner's Reply to Reponse to Order to Show Cause, p.5, reads:

> The basic principles of a fair and objective hearing should always be accorded to the physician whose professional conduct is being reviewed. The fundamental aspects of a fair hearing are: a listing of specific charges, adequate notice of a right to a hearing, the opportunity to be present and to rebut the evidence, and the opportunity to present a defense. These principles apply when the hearing body is a medical society tribunal or a hospital committee composed of physicians. These principles of fair play apply in all disciplinary hearings and in any other type of hearing in which the physician may be deprived of valuable property rights. Whenever physicians sit in judgment on physicians and whenever the judgment affects a physician's reputation, professional status, or livelihood, these principles of fair play must be observed.

meeting of the Credentials Committee . . . and the staff meeting. . . . He contends these proceedings were actually hearings and that his constitutional rights were not respected. It is not argued plaintiff was accorded due process in these proceedings, but defendants [hospital board] contend they were investigatory only and no constitutional rights were violated. We agree.

The cases recognize a distinction between an 'investigation' and a 'hearing' or 'adjudication.' A provision for 'investigation' ordinarily is not the requirement of a 'hearing' and constitutional rights in adjuicatory proceedings and provisions of statutes and regulations made applicable to 'hearings' may be held inapplicable to investigations. A one-sided investigation does not constitute a hearing...

Due process of law does not require that rights normally associated only with adjudactory proceedings be accorded in a general fact-finding investigation by an agency which does not adjudicate even assuming that as collateral consequences of the investigation persons who appear as witnesses before it may be subject to public opprobrium and scorn, the likelihood of losing their jobs.... It is difficult to see how these proceedings could be considered anything other than investigatory. The Credentials Committee and the medical staff had no authority to act. All they could do was recommend such action as they felt proper under the circumstances to the board of trustees. The proceedings in question were more closely akin to grand jury proceedings than a judicial hearing.

Koelling v. Board of Trustees of Mary Franis Skiff Memorial Hospital, 259 Iowa 1185, — 146 N.W.2d 284, 292 (1966).

3. *New Evidence.*

The petition contends that due process was denied by the presentation of "new evidence" at "due process" hearings. Pet. 9.

The bylaws expressly contemplate "new or additional evidence" in the middle of an Executive Committee or Board hearing. Art. VIII, sec. 2(f); App. 19. The Board would not be discharging its reponsibilities if it closed its eyes to any relevant evidence, no matter when it came to the Board's attention.

The petition does not identify a single example of this "new evidence" to which it objects. (This objection may possibly relate to the Swan-Ganz proceeding. See App. 176-7.) (sic) Nor does it provide any inkling as to how Dr. Shahawy might have been prejudiced. Lacking specificity, we submit that if this had created any significant problem, the Board would have given Dr. Shahawy time to produce a rebuttal. See App. 177. No objection to new evidence, and no request to a rebuttal opportunity, was made during oral argument at the close of the Board hearing or at the appeal hearing.

4. *Preponderance of the Evidence.*

The petition objects to the provision in the bylaws that at a "due process" hearing a physician faced with an adverse recommendation is responsible for supporting his challenge "by an appropriate showing that the charges or grounds involved lack any factual basis or that such basis or any action based thereon is either arbitrary, unreasonable or capricious." The petition goes on to assert that the Board is required to reach its decision by a preponderance of the evidence. Pet. 9.

While the quoted language is entirely proper when the Board is reviewing a recommendation of the Executive Committee following a due process hearing by that committee, the court need not consider this objection. The Board held a "full

and fair'' *de novo* hearing, rather than conducting an appellate-type review. App. 741-2. The Board considered all the evidence, not merely the evidence adverse to Dr. Shahawy. App. 1593. The findings of fact show that the Board based those findings on a preponderance of the aggregate evidence.

5. *Impartiality.*

The petition contends that the members of the Board ''were in no sense impartial.'' Pet. 11.

The basis of Dr. Shahawy's allegation is that certain members of the board of directors were defendants in litigation brought by Dr. Shahawy. His argument is somewhat akin to the plea of the man who murdered his parents and begged the mercy of the court because he was an orphan. Without question, the board of trustees were aware of Dr. Shahawy and of the disputes involving Dr. Shahawy. That fact alone, however, does not make them legally biased.

The examples given to demonstrate this claimed bias—lack of notice, inadequate time to prepare, etc.—are false, as has been shown above.

What Dr. Shahawy really wanted was to by-pass the entire credentialling process and have his status determined by an ad hoc committee of strangers. App. 342, 348, 753, 1599, 1614, 1635. Not only would such a procedure be unwise, but it simply would be outside the power of the Board. The authorities are clear that the Board itself must make final decisions as to staff membership and privileges, with input from Medical Staff committees. *Johnson v. Misericordia Community Hospital, supra.*

The ''rule of necessity'' applies which requires the board to exercise its legal authority to hear the matters related to the physician's application for reappointment and to make its determination. The application of that rule was explained in

Leonard v. Board of Directors, Prower County Hospital District, 673 P.2d at 1023:

> Here, the withdrawal of the hospital board members for reason of alleged bias would make it impossible to decide the question of the plaintiff's medical staff privi leges since the board is the only body empowered under the bylaws to make such a decision. As the court stated in *Duffied v. Charleston Area Medical Center, Inc.* 503 F.2d 512, 519 (4th Cir. 1974), in commenting upon the rule of necessity: '(t)he claim of the appallate, if sustained, would have disqualified all members of the Governing Board from acting and would have made it possible for the Hospital to have validly terminated the appellant's staff privileges, whatever the factual justification for that termination. Such a frustration of the power to act, it is held under this rule, is intolerable. '...(D)isqualification will not be permitted to destroy the only tribunal with power in the premises.' *Board of Medical Examiner v. Steward,* 203 (M.D. 574) 102 A. 2d 248, 252 (1954). In applying the rule of necessity and in holding that it prevails over the policy of disqualifications for interest, we are adopting what has been recognized as the majority view. *Schwab v. Ariyoshi,* 57 H.A.W. 348, 555 P.2d 1329 (1976). See also, *New Jersey State Bar Ass'n. v. New Jersey Ass'n. of Realtor Boards,* 118 N.J. Super 203, 287 A.2d 14 (Ch.Ct. 1972).

B. THE BOARD'S DECISION ACCORDS WITH ESSENTIAL REQUIREMENTS OF LAW.

The petition charges that the bylaws violate Florida Statutes, chapter 395, and that the Board and the Medical Staff did not observe their own bylaws. Pet. 11.

The statutes require no more than constitutional due process. It has been demonstrated above that this is provided in

the bylaws.

The petition likewise does not establish any instance of a significant disregard of the bylaws. Pet. 8-11. The general contentions with respect to (a) hearings by Medical Staff committees, (b) attendance at staff committee meetings, (c) the appeal procedure, (d) new evidence, (e) advice from legal counsel, and (f) bias—all unsupported by citations to the appendix—boil down to matters which are not inconsistent with the by-laws.

Even if there were some departures from the bylaws—which we emphatically deny—that would not automatically invalidate the Board's action. That is not a ground for reversal without a showing that Dr. Shahawy was substantially prejudiced. *United Tel. Co. v. Mayo,* 345 So. 2d 648 (Fla. 1977).

> The determination of whether a particular procedural defect may be disregarded as merely harmless must be based in large measure on the nature and significance of the error and its relationship to the rights of the affected party.

Guerra v. State, Dept of Labor & Employment, 427 So. 2d 1098, 1103 (Fla. 3d DCA 1983).

The general allegations in the petition of horrendous prejudice are not supported by references to specific evidence and in actuality are groundless.

C. THE BOARD'S DECISION IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

The Board held a hearing on October 24, 25 and 26, 1983 (transcript at App. 796-1580), lasting three full evenings, a total of more than twenty hours. Documentary evidence was provided to Board members prior to the hearing, with copies to Dr. Shahawy. App. 803.

The Board's decision was unanimous. [6] The basis for the conclusion is explained in findings of fact, App. 1589 et seq., each of which is supported by competent substantial evidence as those two words are defined in *DeGroot v. Sheffield*, 95 So. 2d at 916.

With respect to the suspension from the Medical Staff, the key finding of fact is number 5. To show the court that this finding is supported, we provide the following limited number of quotations from, and references to, the appendix to the petition. To analyze the evidence more exhaustively would unnecessarily enlarge this Response.

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[6]Board member Brand did not participate in the deliberations due to her inability to attend the final day of the hearing. App. 1593.

FINDING 5(a)

5. Dr. Shahawy's behavior in the hospital has been disruptive to the orderly operation of the Hospital and its essential Medical Staff activities; specifically:

(a) Dr. Shahawy has harassed and threatened physicians on the Medical Staff in an effort to force them to act in accordance with his wishes. Such harassment and threats include service of subpoenas on physicians at their homes or just prior to credentialling meetings, threats of lawsuits, threats to "expose" incidents of patient mismanagement as well as unspecified threats "to ruin" and "to destroy" individuals.

Dr. Marc E. Silverstein testified (App. 1031-1033):

A. I was certainly greatly harrassed (sic) by Dr. Shahawy over a long period of time. Mainly, through phone calls to my home on frequent evenings, to a point where I had to have my wife and children answer the phone. And, I just refused to answer the phone.

* * *

A. ... initially, I was sympathetic. And, initially, Dr. Shahawy came to me long before he submitted his application and presented all of his credentials to me. And, when he initally did that, I was very supportive. And, I thought that he should have submitted an application.

But, then, things just mushroomed and got out of hand to a point where he would constantly approach me, call me at home, grab me in the hallway and take me into a corner, and you'd be sequestered -- I would be sequestered

for incredible periods of time. There would be innumerable phone calls to the office during office hours, when I would tell him I'm with a patient and he'd say, I must talk to you And, he really had no consideration of the fact that time was limited, both at home and in the practice. And, this was the type of fall that I had with him.

Q. Were you ever threatened with a subpoena or a lawsuit by Dr. Shahawy?

A. I don't ever remember being threatened directly. Certainly, he threatened multiple other people in my presence. In other words, he told me he was going to do things to other people and the implication was, if you don't cooperate, the same thing will happen to you. And it did. But, he never actually said that.

Q. What were the kinds of things that he indicated to you he was going to do to other people?

A. He said he would ruin them. He said that he would sue them. That he would never give up his fight to obtain his privileges, and that he would sue as many people as he had to to obtain justice. And, he said this over and over again.

Q. Do you recall any other instances where you felt Dr. Shahawy was harrassing (sic) you?

A. Yes. One situation that has nothing to do with privileges was the fact that Dr. Shahawy decided to call my office manager on two occasions, for reasons really unknown to me. But, this was a manager who had previously worked for him in years before and who is our manager.

> And, he, in my opinion, harrassed (sic) her and suggested that she would be better off not working for me.

Dr. David R. Stutz testified (App. 950):

Q. Dr. Stutz, have you ever felt harrassed (sic) or threatened by Dr. Shahawy?

A. Not threatened; certainly harrassed (sic). Being named in a lawsuit and being charged as a conspirator in trying to violate his Civil Rights, and as racketeering and so on, I would certainly interpret it as harrassment (sic) or preceive as harrassment (sic). But, personally threatened, no.

As to the service of subpoenas at the time of credentialling meetings, see App. 79, 82, Dr. Charles R. Mathews testified (App. 898-9).

> The incidents of subpoenas being served on the Credentials Committee immediately before they were having a meeting is intimidating, and this will have a deliterious (sic) effect upon their ability to impartially and impassionately consider the qualifications of the physicians.

Dr. George A. Bishopric testified that Dr. Shahawy threatened to "expose" and "destroy" him if Dr. Bishopric did not support Dr. Shahawy's application for staff privileges. App. 1194-1197. *See* also App. 1203, "pressures" on a supervisor of nurses.

Additional testimony justifying this finding appears at App. 921, 930, 937, 970, 981-2, 1042, 1063-1066, 1093-4, 1117-1119, 1175-6. There was supporting testimony by eleven different physicians practicing at the Hospital.

FINDING 5(b)

(b) Dr. Shahawy's conduct has directly caused individuals to resign from or refuse to serve on certain committees with responsibility to review, evaluate and monitor the quality of patient care, thus impeding the legally required functioning of these committees.

Dr. Richard Sarkis resigned from a committee because his health deteriorated, caused at least in part by stress resulting from Dr. Shahawy's "derisive and abrasive" influence. App. 1094-1096.

Dr. Shahawy's disruptive conduct was "one of the big reasons" why Dr. Bruce H. Berg resigned from a credentialling committee. App. 922.

Dr. Silverstein refused to serve on the Medical Privileges Committee because of Dr. Shahawy's behavior. App. 1031.

The testimony of nine other physicians further supports this finding. App. 898, 938, 957-8, 973, 1022-3, 1088, 1150, 1175, 1210, 1236. *See* also App. 84.

FINDING 5(c)

(c) Dr. Shahawy for a period of time refused to comply with Hospital rules with regard to mandatory consultations for patients in the Cardiac Intensive Care section.

Documents supporting this finding are in the appendix at pages numbered 88-94, 98.

FINDING 5(d)

(d) Dr. Shahawy's interruptions and objections at meetings appear to have been designed to disrupt since Dr. Shahawy declined requests to propose amendments to minutes or to suggests alternatives to the procedures he protested.

This is reflected in the minutes of committee meetings. App. 61-87, particularly App. 70, 71, 77, 78, 82, 85.

In addition, there is testimony by nine physicians.

Dr. Francis Rushton testified (App. 966):

> In Quarterly Staff, whenever Dr. Shahawy came up with a proposal, it was long, repetitive, redundant, and frequently divisive. It was—obviously he was on his own way. The communications are only one way. His stance was not to be modified for consideration of other people. Dr. Shahawy's position, is what mattered. And he made these meetings go on for a long, long, long time, obstructing our ability to carry on a lot of meaningful activity.

Similarly, in meetings of the Medical Section, according to Dr. John N. Carlson (App. 1059):

> On many occasions, Dr. Shahawy would even object to the minutes, and after this had gone on for several meetings, the Chairman would finally ask if he would please state in the form of a motion what he was objecting to, so we could vote on it, and get with the rest of the meeting, and this went on over and over, and other things happened also.
>
> Any time the credentials committee chairman had a report to make, he would always be up, you know, stopping the meeting, whether it concerned him or some other member's privileges, or whether if there was a recommendation to the committee for a rules change.
>
> I can remember at one meeting that it was so bad that he

> kept on talking, so finally, all of the members of the section left, and the Chairman allowed the meeting to adjourn, because there was only about ten people left.

FINDING 5(e)

> (e) Far too many physician hours on Medical Staff matter have been required as a result of the disruption and disharmony caused by Dr. Shahawy.

Dr. Silverstein testified that while he was Chief of Medicine (App. 1030):

> Well, so much of my time was preoccupied with dealing with his complaints, dealing with his monopolizing the Medical Section meetings, dealing with one letter after another, which he would send to me with copies to everyone on the staff, so that I would be constantly inundated by staff members wanting to know what was going on, that I could accomplish very little else during that year but to deal with this problem. And, believe it or not, that's the only thing I did deal with in any comprehensive fashion. I feel very badly about that, because we had other plans.

Dr. Rushton held Dr. Shahawy "individually responsible for just disrupting my year as Chief [of Staff], almost completely... [W]hen I thought we were getting to make progress in three or four different areas where we had some primary concern, Dr. Shahawy's belligerence and attack upon the credentialing (sic) integrity of the staff became full blown, and I spent an incredible number of hours, both first listening to him and then later talking to other members of our staff in trying to evaluate the best way to handle these credentials. Following that, another incredible number of hours in con-

sulting with legal counsel to make sure that he was given his due process and antagonism was not entering into the whole program." App. 968.

Other physicians who experienced or observed time problems included Dr. Mathews, App. 821; Dr. John W. Chidsey, App. 937; Dr. Stutz, App. 950; Dr. Lee Harris, App. 1000-1; Dr. Carlson, App. 1060; Dr. Sarkis, App. 1094; Dr. Joseph Bubinak, App. 1119; Dr. Richard W. Hoefer, App. 1167-8; and Dr. Bishopric, App. 1206.

FINDING 5(f)

> (f) Dr. Shahawy evidenced an inability and a disinclination to get along with others in the Hospital setting and to participate harmoniously in Medical Staff affairs. He has disrupted the orderly operation of the Hospital to the detriment of the Hospital and its patients, thus rendering him unqualified for continued Medical Staff appointment.

This finding is self-evident from the findings in the preceding subparagraphs. Those basic findings, flowing logically from extensive testimony by persons best able to observe Dr. Shahawy's conduct, lead necessarily to the ultimate determination that Dr. Shahawy, over a considerable period of time, has refused to fit himself smoothly into the Hospital's sensitive operating mechanisms and this has interfered with the quality of patient care, directly as well as indirectly through lessening the efficiency of Hospital functioning.

The Board's inductive reasoning was buttressed with direct testimony.

In response to a question from Board member Baumann, Dr. Rushton testified (App. 985-6):

Q. Doctor, you indicated earlier that besides the problems created to the staff, that it affected the optimum care of the patients. [App. 972] Could you elaborate on that?

A. Yes, I can. I think that you'll understand, Mr. Baumann, that if you've been in a long hassle and emotionally straining meeting, when you're trying to go forward and it's taking several hours, that your time to serve patients has been disrupted. And, this happened over and over again.

Secondly, your attitude towards patient care has got to be modified. We struggle to never let that influence you, but no matter if you're in a tedious, technical task, the emotional stress is certainly not helpful. And, if you exponentialize the number of disruptive hours by the members of the staff that this man has harrassed (sic), I don't know where you draw the line. Then, if you can go further, if it's his patients that have to be served, after awhile, who wants to go help him, because you're liable to get another subpoena.

Dr. Carlson testified (App. 1066):

A. I think that Dr. Shahawy has been very disruptive of staff functions through its committees. The committees of this Hospital do the hospital work, and the guys on those committees are the people that get things done, especially the credentials committee. That's the committee that makes sure that the proper care is given to patients by qualified doctors, and I think that has been interfered with.

Finally, there was testimony by Dr. Stutz that the public perception of the Hospital has been injured by Dr. Shahawy

(App. 951):

> In terms of the general community, I think it's had a negative effect. There have been a number of things in the paper in terms of stories, descriptions of the credentialing process. And, unfortunately, they've been largely one sided in the sense that credentialing process has been confidential, and the number of things that Dr. Shahawy may have said in articles or quoted or whatever have not — could not be countered by people involved in credentialing. So, I think the community has received a negative view of the hospital, of the physicians, of the credentialing process, as if we were persecuting one of the staff members.

The foregoing establishes that actual events occurred: a series of unsuccessful lawsuits, threats to sue or to ruin other physicians, frequent interference wiht the conduct of committee meetings, diverting physicians' time from productive Hospital activities, and causing physicians to refuse to serve on peer review committees.

This pattern of disruptive conduct, extending over a period of several years, [7] both threatened the quality of patient care and damaged the efficient functioning of the Hospital,

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[7]The petition argues that the board "impermissibly relied on ancient history." Pet. 12. To the contrary, the Board was entitled to consider the cumulative nature of all of Dr. Shahawy's behavior in the hospital. By reappointing Dr. Shahawy each year, the hospital was not "forgiving" past misconduct. *Williams v. Kleveland,* 534 F. Supp. 912 (W.D. Mich. 1983); *Leonard v. Board of Directors of Prowers County Hospital District.*

The *Leonard* case states at 673 P.2d 1023:

according to testimony before the Board. The findings show that the disruption took many forms beyond the mere instituting of the litigation. The cumulative effect was a most serious problem within the Hospital. Case law previously cited outlines the hospital's responsibility to make sure that the care provided in the hospital is appropriate and that the people who are rendering that care are qualified to do so. The only way that can be accomplished is through an effective peer review process. It is essential to the operation of a modern hospital that the peer review process function effectively. The basis of that case law was summarized by Dr. Berg (App. 923-4):

Q. Do you have an opinion, generally, as to the effects of Dr. Shahawy's behavior on Memorial Hospital of

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For example, plaintiff argues that the hospital board's use of a 1977 complaint against him proves the board's bias against him because since 1977, the board had annually renewed plaintiff's staff privileges. But as the court stated in *Miller v. Indiana Hospital*, 277 Pa. Super 370, 419 A.2d 1191, 1194 (1980), plaintiff's "stale charge" argument is without merit:

Merely reappointing appellant annually to the staff did not indicate an intention on the part of the hospital to ignore the cumulative affect of appellant's prior misconduct. Appellant has neither alleged nor proven any reliance upon the assumption that the actions of the hospital constituted a waive. It was therefore proper for the hospital committees to consider prior misconduct which may not have been so egregious in any one year as to warrant denial of reappointment, but the cumulative affect of which called for appellant's dismissal from the staff.

See also *Colorado's State Board of Medical Examiners v. Jorganson*, 198 Colo. 275, 599 P.2d 869 (1979).

Sarasota?

A. Yes, I do. I think it has been detrimental. The impression I have, and just the feeling, is that committees are difficult enough to work on, but yet, committees make the hospital run. If people are afraid to serve on committees because they don't want to get involved in litigation, that makes it very difficult to conduct business and to, you know, move ahead. And, without that, I have had the definite feeling that we have just been stagnating for the last year or more, perhaps even before I came, because of all the problems and just trying to take care of routine business. We have had to call so many extra meetings of our particular committee that we can't even handle the normal problems of the catheterization labratory. It's easy for me to understand why people don't want to serve on committees, and now, I'm one.

Under the circumstances shown in the appendix to the petition, which govern the decision of this court, the Board had not only authority but also the duty to deny reappointment to Dr. Shahawy.

VI. ARGUMENT—SUSPENSION OF SWAN-GANZ CLINICAL PRIVILEGES

When it is believed that there is a need for immediate action in the interest of patient care, the Executive Director and the Chief of Staff are authorized to summarily suspend clinical privileges. The affected physician may request that the Executive Committee hold a hearing, and may appeal to the Board an adverse recommendation by the Executive Committee. Bylaws art. VII, sec. 2; App. 16.

The Chief of Staff, with the concurrence of the Executive Director, summarily suspended Dr. Shahawy's Swan-Ganz

clinical privileges by letter dated April 8, 1983. App. 98, 825. On April 12, Dr. Shahawy appealed to the Executive Committee. App. 119. Documentation relating to the summary suspension was forwarded to Dr. Shahawy on April 14, who submitted written comments on April 18. App. 120, 123. An ad hoc committee was appointed. App. 128, 129. Dr. Shahawy presented his views to the ad hoc committee on May 12, 1983. App. 143-152. The committee first recommended that the Executive Committee hold a hearing, App. 155, and subsequently provided a supplemental report concluding that Dr. Shahawy lacks basic technical skills to perform the Swan-Ganz procedure. App. 158.

The Exective Committee began its hearing on June 1, 1983, pursuant to written notice to Dr. Shahawy; this includes specific charges and description of pertinent information considered theretofore, as contemplated by the bylaws, and an opportunity to have more time to prepare. App. 175-180. A letter with nineteen attachments was submitted by Dr. Shahawy and he appeared at the hearing. App. 182-185; transcript of hearing App. 186-333. The hearing was reconvened on July 6, 1983; in response to notice of the hearing, Dr. Shahawy declined to participate. App. 346, 350. The Executive Committee recommended to the Board that the suspension be continued, explaining its reasoning. App. 352-354. Dr. Shahawy was notified. App. 725.

At the Board level, the Swan-Ganz proceeding and the staff membership proceeding coalesced. As described at page 13 above, there was a single notice of hearing, a single *de novo* Board hearing and single findings of fact and appeal.

A. THERE WAS NO DENIAL OF PROCEDURAL DUE PROCESS.

As with respect to the staff suspension proceeding, notice was provided to Dr. Shahawy, including a series of notifica-

tions and detailed notice of the Board hearing.

There was more opportunity to be heard than is required. Dr. Shahawy presented his views to the ad hoc committee and to the Executive Committee. At the *de novo* Board hearing, there was testimony by witnesses favorable to Dr. Shahawy and he testified at length himself. The completeness of the *de novo* hearing cured any alleged defects in the committee procedure.

With respect to the specific arguments in the petition as to denial of procedural due process, the refutation of those points at pages 16-20 above is equally applicable here. In addition, Dr. Shahawy was given a hearing by the ad hoc committee and the Executive Committee as to Swan-Ganz.

B. THE BOARD'S DECISION ACCORDS WITH ESSENTIAL REQUIREMENTS OF LAW.

This is shown at pages 20-1 above.

C. THE BOARD'S DECISION IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

The Board's decision to continue the suspension of Swan-Ganz privileges is supported by evidence from five Hospital employees who actually observed Dr. Shahawy perform this procedure: nurse Susan Christian, nurse Patricia Champlin, respiratory therapist Janet Sclafani, all three of whom were live witnesses at the Board hearing; chief respiratory therapist Curtis Williams, whose deposition in the case of *Shahawy v. Harrison,* taken by Dr. Shahawy's counsel, was in evidence; and respiratory therapist Jim Jackson, whose memorandum report was in evidence. The Board had before it transcripts of Ms. Sclafani's testimony at the Board hearing in Case No. 83-1534 and of her deposition in the case of *Shahawy v. Elliott,* taken by Dr. Shahawy's counsel.

Other supporting evidence is found in the testimony of a number of physicians who had participated in the peer review of Dr. Shahawy's clinical competence, and in the transcripts of the meetings of the ad hoc committee and the Executive Committee with Dr. Shahawy.

The supporting evidence consists principally of events which occurred during Dr. Shahawy's performance of the Swan-Ganz procedure on patient O'Neill on December 28, 1982 and on patient Fricke on April 6, 1983.

The key finding by the Board with respect to Swan-Ganz is finding numbered 4. The following quotations from, and references to, the appendix to the petition show that each of the subparagraphs under finding 4 is supported by competent substantial evidence. Again, these are representative, not an exhaustive analysis of the evidence.

FINDING 4(a)

4. The recommendation to terminate Dr. Shahawy's clinical privileges to perform Swan-Ganz procedures was supported by substantial evidence. Specifically:

(a) The members of the Board find credible the testimony of the two nurses and the respiratory therapist who had observed Dr. Shahawy's performance of Swan-Ganz insertions. They appeared to be sincere in their concern for the patients who were subjected to the procedure and in their description of Dr. Shahawy's difficulties in their performance.

This conclusion by the Board members was obviously based on observation of the demeanor of these three witnesses, Janet Sclafani, Susan Christian, and Patricia Champlin, as well as their testimony. These individuals testified under oath, were cross-examined, and were ques-

tioned by Board members. App. 1239-1319.

The testimony of these three witnesses was consistent with the Jackson memorandum (App. 111) and with the deposition of Curtis Williams. App. 355-453. Mr. Williams had personally observed Dr. Shahawy perform the Swan-Ganz procedure at least a dozen times. App. 374.

In addition, Dr. Hoefer testified, in answer to a question by Board member Tollerton (App. 1181):

> Q. Do you regard the testimony of the technicians you interviewed to be credible?
>
> A. In answering that question, I would like to elaborate. All through the work that has been going on in the last three years, there has been a lot of negative comments saying, well, do you believe the testimony of a technician, and I have thought about that, and I think that a technician may have difficulty in properly serving a judgment as to a physician in terms of why does he do certain things.
>
> The judgment that is called for, I don't think that a technician is capable to judge properly, but I do think that a technician who is experienced and well-trained, and sees a number of people performing the same procedure, has a definite accurate idea of how well that procedure is done, and what kind of techniques we are talking about.

This finding of credibility by the Board is binding on the court. A circuit court, acting in its appellate capacity to ascertain if administrative action is supported by competent substantial evidence, departs from the essential requirements of law if it reevaluates the credibility of evidence. *Board of County Commissioners of Pinellas County v. City of Clearwater,* 440 So. 2d 497, 499 (Fla. 2d DCA 1983).

FINDING 4(b)

(b) Although the evidence was credible that Dr. Shahawy had a good understanding of the technique and process of the performance of Swan-Ganz catheterizations, the evidence was convincing that once he encountered difficulties in locating a vein or inserting a catheter he on occasions became careless resulting in contamination of the sterile field, became unresponsive to suggestions from assisting personnel, became persistent in unsuccessful attempts to force a catheter, and the procedures took far too much time.

1. *Contamination.*

Ms. Sclafani stated that during the O'Neill Swan-Ganz procedure she saw Dr. Shahawy break the sterile field three times by permitting the catheter to touch his arm or his apron. App. 1306-7. Similar contamination occurred repeatedly during the Fricke procedure. App. 111. Contamination is potentially dangerous to the patient. App. 570.

2. *Unresponsive to Suggestions.*

Ms. Champlin and Ms. Sclafani testified that Dr. Shahawy on occasion refused to follow suggestions of technicians assisting him. App. 1275, 1296, 1304, 1307. Mr. Williams had this same experience. App. 392-3. Only after a lively argument did Dr. Shahawy move an incorrectly placed catheter. App. 537-544.

3. *Persistent Forcing.*

Ms. Christian was "bothered" because Dr. Shahawy "kept trying to put the catheter in, and was unable to advance it." App. 1262.

Ms. Champlin had made a written note that Dr. Shahawy "continued to try inserting the Swan-Ganz in

the vessel for a total of nine times without success." In response to a question from Board member Brand whether that was an unusual number of times, Ms. Champlin replied, "If it isn't going to fit, it isn't going to fit." App. 1296.

According to Dr. Hoefer, a physician should know in about two minutes whether a particular vein is going to accept a catheter. App. 1182.

4. *Too Much Time.*

A great many pages of the appendix deal with the length of time consumed by Dr. Shahawy with respect to patient Fricke. Two hours and twenty minutes elapsed between the first incision and the closing of the last incision. App. 1165.

Mr. Sclafani testified that Dr. Shahawy "usually" took several times as long as the average for other physicians she had observed. App. 563, 1305. Both she and Ms. Champlin remembered the average time for other physicians as fifteen minutes. App. 1293.

With respect to the Fricke case, the one that precipitated summary suspension of Dr. Shahawy's Swan-Ganz privileges, Dr. Hoefer testified, in response to a question as to what caused him concern (App. 1165-6):

> A. I think the fact that it took two hours and twenty minutes to perform, and the fact that there was an apparent two-unit blood loss, and also the use of multiple cutdowns, and descriptions of lack of technique that took place during that procedure.
>
> * * *
>
> I think the obvious problem with two hours and twenty minutes is the stress that the patient is under, and is under that kind of duress for that length of time, and it seems to me that unless there are overwhelming reasons to take that long to get that catheter in, somewhere along the line it's important to say enough is enough, and to stop, and

that's the one thing that bothered me.
Obviously, during a prolonged procedure, there was more blood loss than you would care to have, and these are two things that bothered me the most.

FINDING 4(c)

(c) While the Board finds the evidence that Dr. Shahawy has good background and understanding of basic anatomy, the evidence was persuasive that in time of stress or difficulty during a procedure Dr. Shahawy has evidenced an inability to distinguish veins from tendons and arteries.

During the Fricke procedure, Ms. Champlin observed Dr. Shahawy's attempt to insert a catheter into a tendon or a ligament. App. 1275, 1297. Mr. Jackson saw this also. App. 111. On two occasions Mr. Williams saw Dr. Shahawy mistake the brachial artery for a vein. App. 375. Ms. Sclafani saw this happen several years ago. App. 556.

Dr. Bubinak testified that it should be very easy to tell the difference between a vein and an artery and that mistaking one for the other could be life threatening. App. 1153-4. See also testimony of Dr. Hoefer, App. 1183-4.

FINDING 4(d)

(d) The Medical Staff committees which investigated Dr. Shahawy's ability to perform Swan-Ganz procedures provided Dr. Shahawy an opportunity to discuss each of their concerns.

The transcript of the meeting of the ad hoc committee with Dr. Shahawy is included in the appendix to the petition at pages 143-152 and again at pages 160-174. The transcript of the Executive Committee hearing at which Dr. Shahawy appeared is at pages 186-333. During the Executive Committee

session which lasted more than four and a half hours, Dr. Shahawy was expressly requested to comment on each of the nine adverse points in the report of the ad hoc committee.

FINDING 4(e)

(e) Although no patient of Dr. Shahawy died or suffered serious complications as a result of the prolonged procedures, the Board found credible evidence that the most dangerous aspect of Dr. Shahawy's clinical practice and particularly in invasive cardiology, is his refusal to admit he might be wrong, his refusal to accept advice or assistance from his colleagues, his failure to recognize difficulties associated with his performance of certain Swan-Ganz procedures and his tendency to blame other individuals or equipment for his difficulties.

Dr. Harris was questioned at some length on those points. App. 993-998, 1016-1018, 1024-1026. His testimony supports this finding. Asked why he agreed with the recommendation that Dr. Shahawy not be reappointed, he said (App. 998-9):

> A. ... I see Malfous (sic) as a physician who's well trained, who's had good qualifications, but I think he has an unwillingness to accept the fact that he is not the greatest, that he is not the best qualified, that there are people who are qualified to look at him and judge on the thing that he can do. As I understand what he says to us is that he does not make mistakes. And, anybody that can say this to a group of people in a profession, to me, I use the word dangerous, and I'll say it in front of Malfous (sic), I think is a dangerous attitude to have in a profession, whether it be law, or CPA, or particularly medicine. And, I've heard that come out of Malfous (sic) several times, and every time I heard it, it's dangerous.

Dr. Hoefer testified that Dr. Shahawy blamed "inadequate medical equipment, and inadequate nursing cooperation" in part for the two hours and twenty minutes required for patient Fricke. App. 1171-2.

Self-justification characteristics of Dr. Shahawy are apparent throughout his statements to the ad hoc committee and the Executive Committee; e.g.; App. 166-171, 203, 222-225, 265-321.

The Executive Committee report to the Board included this parapraph (App. 354):

> The final session was a relatively brief one, with spirited discussion. Among the problems addressed was Dr. El Shahawy's demonstrated unwillingness, or inability, to recognize *any* problems in his performance of Swan-Ganz procedures. It was further emphasized that the report of the Ad Hoc Committee addressed continuing, longstanding difficulties and did not rely entirely on a single incident.
> (Emphasis in report.)

Finally, Dr. Shahawy's own testimony at the Board hearing reinforces this conclusion. App. 1460-1463, 1488-1491, 1494, 1538.

FINDING 4(f)

(f) There was credible evidence that in one instance, a patient suffered significant blood loss that went by unrecognized or at least undocumented by Dr. Shahawy.

This refers to the Swan-Ganz procedure performed on patient Fricke. Ms. Christian testified that there was a significant dripping of blood from the incision in the neck for an extended period of time. App.1253-4. Mr. Jackson noticed a

"large volume of blood that had escaped from the neck wound." App. 111.

Dr. Harris testified that the patient "lost too much blood, and it wasn't recognized." App. 994. See also statements by Dr. Bishopric and Dr. Natarajan during Executive Committee meeting. App. 313, 321.

Ms. Champlin testified that "it's kind of an unspoken thing" among the nursing staff "that Dr. Shahawy's Swan-Ganz insertions are very lengthy, and there's always a lot of blood loss, and he has a great deal of difficulty in getting in." App. 1269-70.

FINDING 4(g)

(g) The recommendations of the ad hoc committee and the Medical Staff Executive Committee to terminate Dr. Shahawy's clinical privileges to perform Swan-Ganz procedures were proper and such recommendations were not arbitrary, unreasonable or capricious.

This finding is supported by evidence referred to under subparagraphs (a) through (f).

The foregoing recital shows that there was before the fered during the Board hearing. Even if it had been, however, port the Board's action in sustaining the suspension of Dr. Shahawy's Swan-Ganz privileges. There is no merit in Dr. Shahawy's argument to the contrary.

The testimony of the technicians is not contradicted by either medical records or the testimony of the patients themselves. See Pet. 12. Testimony of patients was not offered during the Board hearing. Even if it had been, however, a patient cannot be expected to know whether or not a procedure is being performed properly.

Medical records are not adequate to show whether the

physician performed well or poorly. App. 278, 325, 574-576, 891, 1170, 1283. Medical records are thus less reliable than technicians' description under oath of events which they observed; the technicians did not purport to evaluate performance. App. 1261. Dr. Bubinak testified that nothing was proven by evidence that neither patient Fricke nor patient O'Neill apparently suffered any ill effects; what matters, he said, is that patients are placed in jeopardy when there is a lack of manual dexterity as was shown with respect to Dr. Shahawy. App. 1127-8, 1155-6. Dr. Harris also testified that the fact that a patient subsequently did well does not mean that the procedure was performed properly or skillfully. App. 1022.

The Board listened to the testimony that was favorable to Dr. Shahawy, and to Dr. Shahawy himself, and reached its conclusion after considering all the evidence. App. 1593. As has been pointed out above, it is not the function of the reviewing court to reweigh the evidence and substitute its judgment for that of the Board.

VII. CONCLUSION.

The 1,785 pages of the appendix to the petition are replete with competent substantial evidence that Dr. Shahawy's disruptive behavior was so serious as to warrant non-reappointment, that his attitude and lack of manual dexterity in performing the Swan-Ganz procedure endangered patients, and the entire proceeding leading to the Board's action afforded Dr. Shahawy constitutional procedural due process. The petition should be dismissed.

Respectfully submitted,

Of Counsel:

Horty, Springer & Mattern
4614 Fifth Avenue
Pittsburgh, PA 15213
(412) 687-7677

WILLIAMS, PARKER, HARRISON, DIETZ & GETZEN
1550 Ringling Boulevard
Post Office Box 3258
Sarasota, Florida 33578
(813) 366-4800
Attorneys for Respondent

By: /S/
A. Lamar Matthews, Jr.

/S/
William T. Harrison, Jr.

/S/
Frazer F. Hilder

1239:FFH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above was mailed to Guy B. Bailey, Jr.,Bailey & Dawes, 1820 One Biscayne Tower, Two South Biscayne Boulevard, Miami, Florida 33131 and William M. Hereford, Hereford, Taylor & Lawless, 46 N. Washington Boulevard, Suite 21, Sarasota, Florida 33577, this 30 day of March, 1984.

/S/

Frazer F. Hilder

[Letterhead Of Memorial Hospital]

Attachment 1

September 2, 1983

CERTIFIED MAIL RETURN
RECEIPT REQUESTED

Mahfouz El Shahawy, M.D.
1851 Arlington Street, Suite 206
Sarasota, Florida 33579

Dear Dr. El Shahawy:

This is to notify you that the hearing you requested will be held before the Sarasota County Public Hospital Board in the Board Room on September 13, 1983, beginning at 4:15 P.M. The procedure to be followed is outlined in the medical staff bylaws and supplemented by the procedure attached to this letter as Appendix A.

The statement of grounds and specifications which form the basis of this hearing is attached as Appendix B.

Sincerely,

/S/
H.J. Floyd
Executive Director

HJF/wp

cc: Peter M. de Manio, Esq.
James C. McManus, Esq.
W. T. Harrison, Jr., Esq.

APPENDIX A

HEARING PROCEDURE

The hearing procedure is described in general in the Medical Staff Bylaws. However, the following matters are noted to state for the record the rules governing these proceedings:

1. The Chairman of the Board shall preside at the hearing and shall:

   (a) insure that each party will have a reasonable opportunity to be heard and to introduce documentary evidence;

   (b) maintain decorum;

   (c) determine the order of procedure throughout the hearing; and

   (d) rule on questions or objections and on the admissibility of information after considering advice of hospital counsel.

2. Dr. Shahawy and the hospital are represented by counsel who will present the case of the respective parties.

3. A record will be kept by a stenographic reporter. The cost of the reporter will be borne by the hospital. Dr. Shahawy may, at his option and expense, order copies of the transcript from the reporter.

4. Each party shall have the following rights:

(a) to call and examine witnesses who will testify under oath;

(b) to introduce exhibits and documentary evidence;

(c) to cross-examine any witness on any matter relevant to the charges and to rebut any evidence.

5. Members of the Board may question the witnesses and call additional witnesses as they deem appropriate.

6. Special counsel for the hospital will open with evidence in support of the hospital's position.

7. The hearing will not be conducted according to the rules of evidence relating to examination of witnesses or the presentation of evidence. Any relevant evidence shall be admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.

8. The hearing shall be closed to the public.

9. The Chairman may adjourn the hearing and reconvene it at the convenience of the participants without special notice. Upon conclusion of the presentation of oral and documentary evidence by each party, the hearing shall end. The Board shall thereafter, outside the presence of all persons, conduct its deliberations and render findings of fact and recommendations.

10. The findings of fact and recommendations shall be based upon evidence produced at the hearing. The Board may postpone its deliberations until it receives the transcript

of the hearing. However, the Board will make every effort to render its findings of fact and recommendations as expeditiously as possible.

APPENDIX B

IN THE MATTER OF:

MAHFOUZ EL SHAHAWY, M.D.

AND

MEMORIAL HOSPITAL OF SARASOTA

NOTICE OF FACTS THAT REQUIRE TERMINATION OF MEDICAL STAFF APPOINTMENT AND CLINICAL PRIVILEGES

A. *Background*

The precipitating event triggering this matter was the suspension of Dr. Shahawy's clinical privileges to perform Swan-Ganz procedures. The evidence heard by medical staff committees of the circumstances surounding (sic) the incident which provoked the suspension appeared to present evidence of a pattern of divisive conduct detrimental to the hospital and it patients. In accordance with the medical staff bylaws, the Swan-Ganz catheterization privileges of Mahfouz El Shahawy, M.D., were summarily suspended by the Chief of the Medical Staff, with the concurrence of the Hospital's Executive Director, effective April 8, 1983. Dr. Shahawy was duly notified of the suspension by letter dated April 8, 1983.

The summary suspension was the result of an incident occurring on April 6, 1983 in which Dr. Shahawy inserted a Swan-Ganz catheter into a patient in the Cardiac Intensive Care Unit. Verbal reports and written documentation including the patient's chart, incident reports and nurses' notes, indicated that Dr. Shahawy's performance of the catheterization was clinically unacceptable and hazardous to patient safety.

Dr. Shahawy appealed the summary suspension of his Swan-Ganz privileges by letter to the Medical Staff Executive

Committee, dated April 12, 1983. The Executive Committee, at its meeting on April 18, 1983 appointed an Ad Hoc Committee, pursuant to the bylaws of the Medical Staff, to conduct a preliminary investigation into the incident of April 6, 1983 and also to review other Swan-Ganz procedures performed by Dr. Shahawy at Memorial Hospital.

The Ad Hoc Committee interviewed Dr. Shahawy and hospital personnel involved in the incident of April 6, 1983. In addition, the Ad Hoc Committee examined documentation and interviewed hospital personnel present at another incident involving a Swan—Ganz catheterization by Dr. Shahawy. This incident took place on December 28, 1982 and bore strong similarities to the incident of April 6.

Following its detailed investigation, the Ad Hoc Committee submitted an intial written report on May 16, 1983 to the Executive Committee of the Medical Staff. Subsequently a supplemental report was submitted to the Executive Committee on May 28, 1983. The reports of the Ad Hoc Committee recommended continued suspension of Dr. Shahawy's Swan-Ganz privileges and were supported by written findings. These are attached as part of the grounds and specifications.

On June 1, 1983 Dr. Shahawy was given a hearing before the Medical Staff Executive Committee. Dr. Shahawy appeared personally at the hearing but declined to call any witnesses. The hearing lasted over four and one-half hours and Dr. Shahawy was given abundant opportunity to state his version of the incident of April 6, 1983 and to address the specific findings of the Ad Hoc Committee. A record of the hearing was made by stenographic reporter and a transcript was made of the hearing and provided to Dr. Shahawy.

By letter of June 28, 1983, Dr. Shahawy was notified that the Executive Committee would reconvene on July 6, 1983. Dr. Shahawy was invited to appear in person and/or submit written memoranda. By letter to the Executive Committee

dated June 30, 1983, Dr. Shahawy rejected the format proposed for the hearing scheduled for July 6, 1983, contending that it did not contain sufficient due process and informed the Executive Committee that he would be away on vacation. Dr. Shahawy neither attended the hearing nor submitted any memorandum.

The Executive Committee met on July 6 and discussed the matter of the suspension of Dr. Shahawy's Swan-Ganz privileges. The Executive Committee voted to sustain the recommendation of the Ad Hoc Committee and voted to recommend that the suspension of Dr. Shahawy's Swan-Ganz privileges be made permanent.

Dr. Shahawy received notice of the Executive Committee's recommendation by letter dated July 29, 1983. Dr. Shahawy appealed this recommendation by letter from his attorney dated August 17, 1983.

Contemporaneous with the above-described events, the Board of Memorial Hospital of Sarasota received a letter from Dr. Shahawy dated June 20, 1983. In this letter, Dr. Shahawy requested that the Board "exercise its power immediately and take action according to the bylaws" with respect ot the suspension of his Swan-Ganz privileges.

The Hospital Board met on July 7, 1983. The Board was aware of the suspension of clinical privileges and other clinical and behavior questions surrounding Dr. Shahawy as well as the pendency of the reappointment process. Partly in response to Dr. Shahawy's letter of June 20, 1983 and partly due to the board members' own awareness of alleged incidents involving Dr. Shahawy which could be considered disruptive of the orderly and efficient operations of the hospital and its peer review process and detrimental to its patients, the Hospital Board voted unanimously to afford Dr. Shahawy a full hearing on all of these matters so that the suspension of Dr. Shahawy's Swan-Ganz privileges "may be resolved as

soon as practicable in concert with his application for reappointment." This statement constitues notice to Dr. Shahawy of the matters to be heard at that hearing. By letter dated July 13, 1983, Dr. Shahawy was informed of the Board's action taken July 7, 1983.

At the same time the yearly reappointment process for the medical staff was underway. At its meeting held on July 7, the Board directed the Medical Staff Credentials and Executive Committees "to forward to the Board any recommendations and evidence they may have concerning clinical privileges questions."

The Medical Privileges Committee had met on June 21, 1983 to review medical privileges of all staff physicians in conjunction with the annual reappointment process. The Medical Privileges Committee voted unanimously to recommend that Dr. Shahawy not be reappointed to the medical staff of Memorial Hospital. The Committee's recommendation was based on Dr. Shahawy's "adverse impact on staff functions" and cited his "intimidation and harassment of staff members and officers and his disruption of committee meetings."

The Credentials Committee voted unanimously on August 11, 1983 to sustain the recommendation of the Medical Privileges Committee that Dr. Shahawy not be reappointed.

Pursuant to the Hospital Board's resolution of July 7, 1983, the Executive Committee voted to forward to the Board for its information both of these recommendations concerning Dr. Shahawy's reappointment. That action was taken when the Executive Committee met on August 15, 1983 and voted unanimously, with one abstention, to sustain the recommendation of the Medical Privileges and Credentials Committee's regarding the reappointment of Dr. Shahawy. Because the Board had determined at its July 7 meeting to provide Dr. Shahawy with a full and fair hearing on all of these matters,

the Executive Committee recommendation was forwarded as information only. The Board had resolved to provide all procedural safeguards at that hearing as outlined in Appendix A. This document constitutes notice to Dr. Shahawy of the hearing scheduled for September. The hospital reserves the right to amend this notice, with the understanding that Dr. Shahawy will have the opportunity to respond to any such amendment.

B. *Statement of Grounds*

The following grounds and specifications are supportive of the recommendation of the Executive Committee of the Medical Staff of Memorial Hospital of Sarasota, in conformity with the provisions of the Medical Staff Bylaws, to revoke the privileges of Mahfouz El Shahawy, M.D., to perform Swan-Ganz and any other invasive procedures at Memorial Hospital. Further, the following grounds and specifications of clinical competence problems and behavior support a decision not to reappoint Dr. Shahawy to the medical staff of Memorial Hospital of Sarasota.

Ground 1:

Dr. Shahawy's behavior has been unduly disruptive of the orderly and efficient operation of the hospital, including its credentialling and peer review process.

Specifications:

(a) Dr. Shahawy's disruptive behavior at various committee meetings includes constant objections to the minutes of prior meetings resulting in unduly long meetings and an inability effectively to complete business legitimately before the committee.

(b) Dr. Shahawy's disruptive and harrassing behavior has caused physicians on the medical staff of Memorial Hospital to refuse to serve on staff committees

that are part of the hospitals credentialling and peer review process and, in some instances, to cause physicians to resign their positions on those committees.

(c) A disproportionate amount of committee time and efforts have been devoted to considering requests and objections of Dr. Shahawy to the detriment of other committee work.

(d) Dr. Shahawy's behavior has exhibited a pattern of threats and harassment (sic) toward the Hospital Board, the medical staff and hospital employees. This pattern includes, but is not limited to, continuous resort to litigation against those who have disagreed with Dr. Shahawy, threats to file lawsuits, telephonic communications at inappropriate times, the surreptitious tape recording by Dr. Shahawy of conversations and discussion without knowledge or permission of those present, threats against physicians on the medical staff, causing subpoenas to be served on committee members prior to committee meetings.

(e) Repeated vioations by Dr. Shahawy of the consultation requirement for patient admission to the Cardiac Intensive Care Unit and other situations in which a consultation was appropriate.

(e) (sic) Dr. Shahawy's apparent belief that no one associated with Memorial Hospital of Sarasota is qualified to review or evaluate his clinical practice, resulting in a frustration of the hospital's peer review process. This attitude on the part of Dr. Shahawy has also impeded the degree of teamwork necessary in the performance of invasive procedures such as Swan-Ganz catheterizations.

Ground 2:

That pattern of behavior adversely affects the clinical practice of Dr. Shahawy to the serious detriment of patient care in the hospital.

Specifications:

The findings of the Ad Hoc Committee appointed by the Executive Committee are incorporated by reference and attached to this document.

Ground 3:

Dr. Shahawy has demonstrated a lack of basic skills and dexterity required in the performance of invasive procedures, specifically Swan-Ganz catheterizations.

Examples of Dr. Shahawy's deficiencies include excessively long procedures, excessively large incisions, inability on occasion to distinguish veins from tendons and arteries, unacceptable blood loss during procedures, difficulty in interpreting wave forms, contamination of the sterile field, inability to recognize difficulties or complications that arise during the procedure and failure to acknowledge an error or problem.

Specifications:

Patient John O'Neil

Patient Werner Fricke

Descriptions of procedures by those who participated and observed. That description is available to Dr. Shahawy in the deposition and transcribed testimony of Curt Williams and Janet Sclafani.

Ground 4:

Dr. Shahawy has displayed an inability to work effectively in emergency situations, resulting in a failure to heed advice and instructions given to him by those assisting in procedures and treatment and causing prolonged discomfort and blood loss to patients. That too may, at least in part, be attributed to the same pattern of behavior described above and constitutes further evidence of the detrimental effect such

conduct has on hospital operations generally and patient care in particular.

Specifications:

Patient Werner Fricke

Patient John O'Neil

Description of procedures by those who participated and observed. That description is available to Dr. Shahawy in the deposition and transcribed testimony of Curt Williams and Janet Sclafani.

Ground 5:

Dr. Shahawy fails adequately and appropriately to record and document his invasive procedures in patient charts.

Specifications:

Patient Werner Fricke

Patient John O'Neil

Conclusion:

On the basis of the grounds and specifications stated above, there exists substantial evidence to support, even require, nonreappointment of Dr. Shahawy to the medical staff of Memorial Hospital of Sarasota. His disruptive behavior is so pervasive as to affect to its detriment hospital and medical staff affairs and patient care. That, combined with the lack of manual dexterity evidenced in his performance of invasive procedures, renders Dr. Shahawy unqualified for reappointment to the medical staff as described in the Medical Staff Bylaws, Article V, Section III.

[Letterhead Of Memorial Hospital]

Attachment 2

CERTIFIED MAIL — RETURN RECEIPT REQUESTED

November 1, 1983

Mahfouz El Shahawy, M.D.
1851 Arlington Street, Suite 206
Sarasota, Florida 33579

Dear Dr. Shahawy:

Enclosed are Findings of Fact and Conclusion of the Board of Memorial Hospital of Sarasota denying your request for reappointment to the Medical Staff and affirming the suspension of your Swan-Ganz privileges.

If you wish to appeal this decision to the Board, you may do so by writing a letter to me no later than November 8, 1983.

That appeal is limited to submission of a memo to the Board and/or an oral statement to the Board by you or your counsel. If you request an appeal, therefore, please specify whether that appeal will be by way of written statement by you or your counsel.

The decision of the Board will be effective and final in 10 days' time unless you request an appeal.

Sincerely,
/S/
H. J. Floyd
Executive Director

cc: Glenn Woodworth
Linda Hadded
HAND DELIVERED to Dr. Shahawy

On Monday, October 24, 1983, at 4:00 p.m., the Board convened to hold a hearing requested by Dr. Shahawy. The matters to be heard by the Board were outlined in a statement of grounds and specifications provided to Dr. Shahawy on September 2, 1983.

As noted in the Statement of Grounds and Specifications, the issues addressed at the hearing were two-fold. The first issue involved Dr. Shahawy's clinical privileges to perform Swan-Ganz catheterizations at Memorial Hospital These privileges are currently under suspension and there have been several recommendations forwarded to the Board from the Medical Staff reviewing committees that the suspension of Dr. Shahawy's Swan-Ganz privileges be made permanent.

The second issue before the Board had to do with the questions that have been raised concerning Dr. Shahawy's behavior as it affects the orderly and efficient operation of the Hospital and its peer review process. These latter concerns formed the basis of recommendations from the Medical Staff committees charged with the responsibility of making such recommendations during the reappointment process, that Dr. Shahawy not be reappointed to the Hospital Medical Staff.

The hearing consumed three full evenings—from approximately 4 p.m. until 12:00 midnight - - on October 24, 25 and 26. Evidence in support of the Statement of Grounds and Specifications was presented by special counsel to the Hospital. Evidence was presented on behalf of Dr. Shahawy by his counsel. Both counsel had the opportunity to present witnesses and documentation for the Board's consideration, to cross-examine witnesses, to make opening and closing statements and to submit memoranda. Special counsel for the Hospital presented 16 witnesses and two exhibits consisting of 84 tabbed documents which were received into evidence as Hospital Exhibit #1. Dr. Shahawy's counsel presented six witnesses including Dr. Shawawy marked seven exhibits and

offered one exhibit into evidence. All of the testimony was taken under oath. The recommendations concerning Dr. Shahawy's reappointment to the medical staff were made pursuant to the bylaws and to the Board resolution of July 7, 1983. Dr. Shahawy's failure to request a hearing by the Executive Committee and his failure to specifically object to this Board with respect to the absence of a formal Executive Committee hearing, constitutes the waiver of the right, if any, Dr. Shahawy had in that regard.

FINDINGS OF FACT

1. Seven weeks prior to the commencement of the hearing, Dr. Shahawy received specific notice of the statement of grounds and specifications to be considered by the Board.

2. The hearing was postposed twice at Dr. Shahawy's request to allow him additional time to prepare.

3. Several weeks in advance of the hearing, Dr. Shahawy was provided copies of all documents which were submitted to the Board for its consideration.

4. The recommendation to terminate Dr. Shahawy's clinical privileges to perform Swan-Ganz procedures was supported by substantial evidence. Specifically:

   (a) The members of the Board find credible the testimony of the two nurses and the respiratory therapist who had observed Dr. Shahawy's performance of Swan-Ganz insertions. They appeared to be sincere in their concern for the patients who were subjected to the procedure and in their description of Dr. Shahawy's difficulties in their perform-

ance.

(b) Although the evidence was credible that Dr. Shahawy had a good understanding of the technique and process of the performance of Swan-Ganz catheterizations, the evidence was convincing that once he encountered difficulties in locating a vein or inserting a catheter he on occasions became careless resulting in contamination of the sterile field, became unresponsive to suggestions from assisting personnel, became persistent in unsuccessful attempts to force a catheter, and the procedures took far too much time.

(c) While the Board finds the evidence that Dr. Shahawy has good background and understanding of basic anatomy, the evidence was persuasive that in time of stress or difficulty during a procedure Dr. Shahawy has evidenced an inability to distinguish veins from tendons and arteries.

(d) The Medical Staff committees which investigated Dr. Shahawy's ability to perform Swan-Ganz procedures provided Dr. Shahawy an opportunity to discuss each of their concerns.

(e) Although no patient of Dr. Shahawy's died or suffered serious complications as a result of the prolonged procedures, the Board found credible evidence that the most dangerous aspect of Dr. Shahawy's clinical practice and particularly in invasive cardiology, is his refusal to admit he might be wrong, his refusal to accept advice or assistance from his colleagues, his failure to recognize difficulties associated with his performance of certain Swan-Ganz procedures and his tendency to blame other individuals or equipment for his difficulties.

(f) There was credible evidence that in one instance, a patient suffered significant blood loss that went by unrecognized by Dr. Shahawy or at least undocumented by Dr. Shahawy.

(g) The recommendations of the ad hoc committee and the Medical Staff Executive Committee to terminate Dr. Shahawy's clinical privileges to perform Swan-Ganz procedures were proper and such recommendations were not arbitrary, unreasonable or capricious.

5. Dr. Shahawy's behavior in the Hospital has been disruptive to the orderly operation of the Hospital and its essential Medical Staff activities; specifically:

(a) Dr. Shahawy has harassed and threatened physicians on the Medical Staff in an effort to force them to act in accordance with his wishes. Such harassment and threats include service of subpoenas on physicians at their homes or just hours prior to credentialling meetings, threats of lawsuits, threats to "expose" incidents of patient mismanagement as well as unspecified threats "to ruin" and "to destroy" individuals.

(b) Dr. Shahawy's conduct has directly caused individuals to resign from or refuse to serve on certain committees with responsibility to review, evaluate and monitor the quality of patient care, thus impeding the legally required functioning of these committees.

(c) Dr. Shahawy for a period of time refused to comply with Hospital rules with regard to mandatory consultations for patients in the Cardiac Intensive Care section.

(d) Dr. Shahawy's interruptions and objections at

meetings appear to have been designed to disrupt since Dr. Shahawy declined requests to propose amendments to minutes or to suggest alternatives to the procedures he protested.

(e) Far too many physician hours on Medical Staff matters have been required as a direct result of the disruption and disharmony caused by Dr. Shahawy.

(f) Dr. Shahawy has evidenced an inability and a disinclination to get along with others in the Hospital setting and to participate harmoniously in Medical Staff affairs. He has disrupted the orderly operation of the Hospital to the detriment of the Hospital and its patients, thus rendering him unqualified for continued Medical Staff appointment.

6. Dr. Shahawy's disruptive behavior has influenced his clinical performance, particularly during Swan-Ganz procedures, as shown by credible evidence including that he has refused to admit being in error, he has refused to seek assistance from colleagues, and he has a tendency to blame others, individuals or equipment, for his difficulties.

7. The recommendation to deny Dr. Shahawy's reappointment was supported by substantial evidence and was not arbitrary, unreasonable or capricious.

CONCLUSION

The Board deliberated outside the presence of any of the parties except its counsel, William Harrison. Board member Lori Brand did not participate in the deliberations due to her inability to attend the final day of the hearing. After considering all of the evidence and in light of all the foregoing findings, the Board has decided unanimously to deny Dr.

Shahawy's application for reappointment. The Board has also concluded that the suspension of Dr. Shahawy's Swan-Ganz privileges should be sustained, recognizing however that the question of such privileges has become moot as a result of the Board's determination on the reappointment issue.

Although the bylaws of the Medical Staff do not provide expressly for an appeal from this decision, the Board has determined to provide Dr. Shahawy by way of appeal, an opportunity to make a written or oral statement to the Board on any of the matters addressed in this opinion.

This opinion will become effective 10 days from this date, October 31, 1983, unless Dr. Shahawy files such a written request with the Executive Director of Memorial Hospital by November 8, 1983.

DATED October 31, 1983.

IN THE CIRCUIT COURT FOR SARASOTA COUNTY, FLORIDA
CASE NOS. 84-115-CA-01; 83-1534-CA-01

MAHFOUZ EL SHAHAWY,
Petitioner,
v.
SARASOTA COUNTY PUBLIC HOSPITAL BOARD,
Respondent.
_____/

PETITIONER'S REPLY TO RESPONSE TO ORDER TO SHOW CAUSE

Petitioner, Mahfouz El Shahawy, respectfully submits this Reply to the Response of the Sarasota County Public Hospital Board to this Court's Order to Show Cause.

INTRODUCTION

There was a time when the healing arts were practiced in a "country club" environment. Medical staffs were organized as those in control sought fit and were for all intents and purposes above the law.

Those times are no more. Prodded by judicial recognition of the constitutional rights involved, the profession has recognized the need for due process, and the state has insisted upon it. *See* Fla.Stat. Chapter 395.

No longer can a physician be excluded from a medical staff because those in charge dislike his accent or the color of his skin. And no longer can a physician be excluded from a hospital's medical staff simply because those in charge do not like him.

Certain members of the Respondent's medical staff, however, have contrived to expel Dr. Shahawy from the med-

ical staff for the simple reason that they cannot get along with him, For nearly five years now, certain doctors have campaigned to destroy Dr. Shahawy's career. So confident were they that their actions were beyond the law that they ignored the law. As is demonstrated in Dr. Shahawy's prior petition for certiorari, they flagrantly denied him any semblance of due process in excluding him from the cardiac catheterization laboratory and stigmatizing him in his chosen specialization of cardiac catheterization.

Dr. Shahawy, understandably, complained bitterly. He petitioned the courts for redress of his grievances—as is his right guaranteed to him by the First Amendment of the United States Constitution. As their own testimony before the Hospital Board showed, certain members of the medical staff hierarchy were enraged by Dr. Shahawy's litigation. As the litigation escalated, Dr. Shahawy's detractors decided they had had enough. They hired a Pennsylvania law firm specializing in keeping unwanted doctors off hospital staff. And, with this able counsel, these medical staff chieftans determined to turn Dr. Shahawy's understandable outrage againts him. They branded Dr. Shahawy's reaction to their own outrageous conduct "disruptive."

Dr. Charles Matthew, Chief-of-Staff, took matters into his own hands and unilaterally, summarily suspended Dr. Shahawy's privileges to do Swan Ganz catheterizations, in gross and flagrant violation of the medical staff By-Laws. The Hospital Board's Pennsylvania counsel quickly tried to repair the damage to their illicit plans; Dr. Matthews apparently had jumped the gun. Yet the Board, in direct response to Dr. Shahawy's pleas to address Dr. Matthew's illegal actions, initiated proceedings to eject Dr. Shahawy from the medical staff altogether.

Once again, the Hospital Board's skilled counsel whisked through the various committees a recommendation not to reappoint Dr. Shahawy to the medical staff, in a series of

closed meetings, in violation of the federal and Florida constitutions, Fla.Stat. Chapter 395, the American Medical Association Principles of Ethics, and the medical staff's own By-Laws. The first time Dr. Shahawy was permitted to address his reappointment, he was saddled with the burden to establish that there was no evidence whatever to support the medical staff committees' secret recommendations.

In view of the egregious due process violations, this court cannot, Dr. Shahawy respectfully submits, simply affirm by finding "substantial competent evidence." Nevertheless, the evidence is not there.

Dr. Shahawy did Swan Ganz catheterizations at Sarasota Memorial Hospital for over eight year. He still does them at Doctor's Hospital, despite some of the same doctors' efforts to exclude him. They (sic) only physician to testify about his Swan Ganz performance attested to his exceptional abilities. The Board had only the testimony of some disgruntled technicians who purported to describe two particular procedures—procedures Dr. Shahawy performed on seriously ill patients who fared exceedingly well under his care. The technicians' testimony of Dr. Shahawy's supposed mishandling of these procedures is refuted in every material detail by the medical records themselves, and by the testimony of the patients themselves. The technicians' attempts to extrapolate from these two procedures into other problems they had supposedly witnessed is refuted by the indisputable written proof that the technicians were not even present at the procedures they purported to have witnessed.

Notwithstanding the Board's pontifications regarding its concern for the medical welfare of this community, Dr. Shahawy's commitment to providing excellent medical care do (sic) this community is unexcelled. He has served on the staff for over eight years without a single complaint of any of his patients. He has never once even been accused of malprac-

tice in over twenty-two years of medical practice since his graduation *summa cum laude* from the University of Vienna, Austria, in 1962. As a candidate for the Hospital Board in 1980 and in 1982, as a concerned citizen, and as a concerned medical staff member, Dr. Shahawy has continuously urged the Board to strive for the highest possible standards of medical care. Dr. Shahawy was instrumental in establishing the cardiac catheterization laboratory at Sarasota Memorial Hospital, after ariving (sic) in Sarasota in December, 1975, from his acedemic (sic) position at the University of Florida, where he served as a professor of cardiology and a director of the cardiac catheterization laboratory, the heart station, and the cardiac intensive care unit. He has been vocal in bringing to the Board's attention the repeated failures of the medical staff to meet these standards, including the appointment of a physician to the cardiac catheterization laboratory who does not fulfill the established criteria, the appointment of an EKG panel of twenty physicians, the majority of whom do not meet the minimum criteria, the appointment of unqualified physicians to perform echocardiography, and the continued performance of Swan Ganz procedures by the Chief-of-Staff, Dr. Charles Matthews, who again, does not fulfill the established criteria.

It is his vocal dissent from the Board's own inattention to appropriate medical standards that causes the Board now to label Dr. Shahawy "disruptive". Dr. Shahawy would respectfully submit that no one in Sarasota has been more committed to quality health care.

DUE PROCESS OF LAW

Four years of petty political maneuvering and blatant retaliation in violation of due process preceded the Hospital Board's October, 1983 hearing. The Board would now have this Court believe that none of that matters, because the Board

in October, 1983, supposedly approached Dr. Shahawy's reappointment with a "clean slate". The Board necessarily concedes that Dr. Shahawy was entitled to a full and fair hearing, and that this requirement would not be met if the only opportunity he had to be heard required him to meet the high standards of proof required in proceedings such as this Petition for an extraordinary writ. So the Board in its Response, pp. 18-19, claims that the October, 1983 hearing before the Board was such a hearing, and that the Board ignored its own, more rigid By-Law requirement that Dr. Shahawy establish "that the charges or grounds involved lack any factual basis or that such basis or any action based thereon is neither arbitrary, unreasonable or capricious." The Response asserts (p. 19):

> The Board held a "full and fair" *de novo* hearing, rather than conducting an appellate-type review. The Board considered all the evidence, not merely evidence adverse to Dr. Shahawy. The Findings of Fact show that the Board based both findings on a preponderance of the aggregate evidence.

The Findings of Fact in fact show just the opposite. The Board did not make a *"de novo"* determination of Dr. Shahawy's qualifications. The Board plainly conducted an appellate-type review of the medical staff recommendations orchestrated in a series of closed meetings in violation of due process. And, as the Board necessarily concedes, that type of hearing does not satisfy due process.

The Board's decision states:

> The recommendation to terminate Dr. Shahawy's clinical privileges to perform Swan Ganz procedures was supported by substantial evidence...
>
> The recommendation to deny Dr. Shahawy's reappointment was supported by substantial evidence and was not arbitrary, unreasonable, or capricious.

In sum, the Hospital Board's only response to Dr.

Shahawy's complaint that he was entitled to be present when a decision was made to suspend his privileges, and not just when such a decision was affirmed on appellate review, is to say that Dr. Shahawy received such a hearing. The record indisputably shows he did not.

Dr. Charles Matthews, the Chief-of-Staff (and a defendant in Dr. Shahawy's federal lawsuit), began these proceedings on April 8, 1983, by purporting to suspend his Swan Ganz privileges, summarily and unilaterally. As the Hospital Board now admits, the Medical Staff By-Laws states that such action can only be done by "the Executive Director and any one of the following: Chief-of-Staff, Chief-of-a-Section, Executive Committee, Administrative Committee." The Hospital Board's attempts now to say that Dr. Matthews acted jointly with Executive Director H.J. Floyd is a complete fabrication. *See* App. 132-33.

The due process violations that followed are documented in the Petition itself. When the Swan Ganz suspension finally came before the Executive Committee, Dr. Matthews refused to answer questions under oath and refused to let Dr. Shahawy interrogate Executive Committee members, all of whom purportedly had reviewed records and testimonies. On the day after the Executive Committee recommended suspension of Dr. Shahawy's Swan Ganz privileges, the Board met in closed session and voted not only to consider the suspension of Dr. Shahawy's Swan Ganz privileges, but also to consider ejecting Dr. Shahawy from the medical staff itself. Executive Director H.J. Floyd wrote Dr. Shahawy in July 13, 1983:

> Dear Dr. Shahawy:
> Please be advised that the Board of Memorial Hospital, in its meeting held in on Thursday, July, 1983, voted to hold a full and fair hearing on matters relating to your behavior and clincal competence at Memorial Hospital.

> The Board's decision to hold the hearing was prompted in part, by its awareness of questions which have been raised concerning your clinical competence and also by the Board's awareness of alleged incidents which may have been disruptive of the operation of the Hospital and an intimidation of its peer review process. The Board's decision to hold the hearing was also, in part, a response to your request, contained in your letter to the Board dated June 20, 1983.
>
> The Board voted to provide you with a full and proper hearing so that the above questions and incidents may be examined in depth and the suspension of clinical privileges to do Swan Ganz procedures may be resolved as soon as practicable in concert with your application for reappointment.
>
> You will be informed immediately as soon as the Board has established a hearing date.

Although privileging decisions are generally made initially by medical staff committees, the Hospital now protests that Dr. Shahawy waived any objection to the proceeding because he did not demand a hearing before the Executive Committee on his non-reappointment to the medical staff. The Board's protest makes no sense. The Board proclaimed that it would call a "full and fair hearing." Had the normal review procedures been followed, and Dr. Shahawy had been heard in a "due process hearing" by the Executive Committee, and if the Executive Committee voted in Dr. Shahawy's favor, there would be no hearing before the Board. The Board obviously had already determined to preempt that procedure.

The Board in its Response tries to make it appear (p. 12) that the recommendation of non-reappointment initiated with the medical staff committees. It plainly did not. The recommendations recited on p. 12 all occurred after the Board's

decision to hold a "full and fair hearing." Again, if in fact, in response to the Board's inquiry, the medical staff committees had voted to reappoint Dr. Shahawy, there would have been no provision in the By-Laws for any sort of hearing by the Executive Committee or the Board.

Article VII of the By-Laws, §1(a), does permit the Board to request corrective action against a physician. Such a request is to be directed to the Executive Committee, in writing, with reference to the "specific activities or conduct which constitutes the grounds for the request." Section 1(b) then provides that the Executive Committee shall forward the request to the Chief-of-the-Section, who shall then appoint an *ad hoc* committee to investigate the matter. As provided in Section 1(e), *only* if the recommendation of the Executive Committee is against the physician are the hearing procedures of Article VIII envoked. Moreover, Section 1(d) provide:

> If the corrective action could involve a reduction or suspension of clinical privileges or a suspension or expulsion from the Medical Staff, the affected physician or dentist shall be permitted to make an appear ance before the Executive Committee prior to its taking action on such request.

This indisputably did not happen. The Executive Committee met in closed session, without notice to Dr. Shahawy, and recommended that Dr. Shahawy not be reappointed to the medical staff. [App. 97]

For the Board now to say that at that point Dr. Shahawy was required to request an appeal before the Executive Committee is ludicrious (sic). The Board had already announced its intention to hear the matter.

By the time the recommended non-renewal of Dr. Shahawy's medical staff privileges reached the Board, the Board was well represented by able Pennsylvania counsel who had been working for several months behind the scenes to try

to ensure that all necessary formalities were followed to insulate the Board's predetermined decision from judicial review.

Even where it possible to wipe out four years of due process violations by beginning with a supposedly clean slate, the Board did not do so. The Board members (three of whom are defendants in Dr. Shahawy's federal lawsuit) were not given the opportunity to decide for themselves whether Dr. Shahawy should be reappointed to the staff. They were permitted only to determine whether the staff's recommendation was supported by *any* evidence.

And Dr. Shahawy, contrary to the Board's present protests, was not given the opportunity to present his case. Dr. Shahawy repeatedly demanded access to copies of the minutes which allegedly showed his disruption. These have *never* been provided. [App. 782-88] The *ad hoc* committee which recommended affirmance of Dr. Matthews' summary suspension of Dr. Shahawy's Swan Ganz privileges purportedly reviewed Dr. Shahawy's past 25 Swan Ganz catheterizations. Dr. Shahawy repeatedly demanded copies of the charts for those procedures. They were not provided until over six weeks *after* the hearing. [App. 1648]

When the charts were provided, there were only 19, and not 25 as had been stated. The charts showed there had been *no* complications. The charts further showed that the technicians who told the medical staff committees and the Board that they had witnessed these procedures were *not even there.*

Dr. Shahawy requested a witness list from the Hospital Board in advance of the hearing. This request too was denied. The so-called "notice" of the charges against him [App. 743] was a somewhat lengthly but largely meaningless document craftily prepared by the Hospital Board's Pennsylvania lawyers.

Just like the Executive Committee before it, the Board re-

fused to permit its own members to be interrogated. [App. 1331-32] The Board refused throughout to permit Dr. Shahawy's counsel to cross-examine and to elicit evidence to present the true and overriding fact of the case — that the entire proceeding has been carefully orchestrated by counsel and certain members of the medical staff intent on retaliating for Dr. Shahawy's attempts to exercise his constitutional rights. For example, nurse Patricia Champlin testified to one of the two Swan Ganz (sic) procedures under scrutiny. When she testified on cross-examination that she had not discussed her testimony or the matter of Dr. Shahawy's abilities with anyone, Dr. Shahawy's counsel was able to prove that she had in fact met with Hospital counsel months ago on this very subject:

> Q. [B]ut in between O'Neil (sic) and Fricke, did you have any occasion to discuss the matter of Dr. Shahawy's technique with anybody of the hospital staff, or did any member of the staff have occasion to discuss it with you?
>
> A. Not any more than what would normally be said, like I already said to Mr. McManus, oh, you know, it was lengthy, and it was bloody. He has a reputation for that among the Hospital staff.
>
> Q. But, you had no particular conversation with anybody about it?
>
> A. No.
>
> Q. Nobody instructed you to be particularly careful with regard to preparing notes or memoranda concerning Dr. Shahawy and his procedures?

A. No.

Q. Nobody requested that you have anybody come in to observe his procedures?

A. No. Absolute (sic) not.

Q. Nobody asked that you take any particular pains to note anything or to engage in any kind of activities with regard to Dr. Shahawy's procedures, other than anybody else's; is that your testimony?

A. That's correct.

Q. Did you have any conversations with Mr. Bowman, the attorney for the Hospital, about those procedures?

A. I was called and questioned by Mr. Bowman about O'Neil (sic).

Mr. McManus: I am going to object at this point.

[App. 1284-85]

After a ten-minute recess during which the Chairman conferred with the Hospital counsel [App. 1286-87], the Chairman sustained the objection, refusing to let Dr. Shahawy's counsel reveal the fabrication of testimony.

Dr. Shahawy in his Petition has already demonstrated the obvious, that the concept of a hearing in which the party seeking relief must demonstrate the absence of any evidence to support an adverse decision is totally inconsistent with the

Board's presentation of new evidence. The Board claims that Dr. Shahawy made no objection to such evidence. That, once again, is false. Among other things, the Board's failure to provide the actual charts on which the medical staff committees had purportedly relied made it impossible for Dr. Shahawy to prepare his case, and yet numerous witnesses were permitted to testify about those procedures. And, Dr. Shahawy's counsel vigorously objected:

> I would... like to point out that it was not until this meeting actually evolved that Dr. Shahawy had any notice whatsoever as to its parameters [sic] or its proportion. And, I must tell you in all candor that if Dr. Shahawy is to appropriately defend himself and appropriately establish his position, he is going to have to have sufficient time to that.
>
> And, not only that, he is going to have to have access to sufficient records to do that. And, I am going to ask that all of the charts which touch upon Dr. Shahawy's qualifications be made available to Dr. Shahawy or his designee for purposes of review.
>
> [App.1049]
>
> Mr. Chairman, I want the record to be clear. Dr. Shahawy has for many, many weeks, even months since the commencement of these proceedings, requested that the Hospital provide him with a transcript, the official transcript of those meetings, which said requests have been consistently and adamantly refused.
>
> I am perfectly willing, even at this late date, for the

> Hospital's counsel to produce those official transcripts, and I would be delighted to question from them.
>
> Now, the fact of the matter is that we have been totally and completely frustrated in all our attempts to gain access to and to obtain those documents necessary for the full and fair exposition of Dr. Shahawy's defense in this case.
>
> [App. 1079]

The Hospital Board's determination to exclude relevant evidence andpresentonly the case against Dr. Shahawy is aptly demonstrated by the complete "turn-around" on the status of Dr. Shahawy's privileges at Doctor's Hospital. The Board's counsel at the October, 1983 hearing asked that Dr. Shahawy provide the Board with a report from Doctor's Hospital on a similar attempt to suspend his Swan Ganz privileges at that hospital. [App. 1174, 1376] The report subsequently came out, and the committee at Doctor's Hospital exonerated Dr. Shahawy completely of Dr. Matthew's charges, and sustained his Swan Ganz privileges. The Hospital Board then refused to receive this report. [App. 1611-12]

The Board claims that Dr. Shahawy received a full and fair hearing—that Dr. Shahawy has not established that the Board was biased, or that he was waived the right to an impartial tribunal by suing three members of the Board. The fact is that the Board refused to permit Dr. Shahawy even to examine the Board to make a record to demonstrate their bias. The Board has been involved in litigation with Dr. Shahawy for nearly four years. Three of the Board members have been sued individually, for damages. The Board had already committed the Hospital's vast resources to pay attorney's fees and

judgments for anyone who dared to challenge Dr. Shahawy. The Board itself had initiated this proceeding, in its July 7, 1983 resolution, in a closed session in violation of tDr. (sic) Shahawy's right to due process.

And yet, knowing that this Court would be limited to the record, the Board refused to even let Dr. Shahawy inquire to demonstrate the Board members' biases. As the Board's Pennsylvania counsel said in a published interview, "'Membership of peer review committees should be monitored very carefully to protect against allegations of bias, conspiracy, or restraint of trade.'" *Medical Economics*, Jan. 28, 1984, p. 259. That denial itself is plainly a denial of due process.

The due process issue here really is quite simple. Florida Statutes §395.011 requires the Hospital Board and medical staff to follow their By-Laws. The By-Laws, at Article III, §2(c), incorporate the principles of the American Medical Association:

> The principles of medical ethics of the American Medical Association and, whereafter applicable the principles of ethics of the America (sic) Osteopathic Association, are the standards by which professional conduct will be judged.

Section 618 of those Medical Ethics provide:

> The basic principles of a fair and objective hearing should always be accorded to the physician whose professional conduct is being reviewed. The fundamental aspects of a fair hearing are: a listing of specific charges, adequate notice of the right to a hearing, the opportunity to be present and to rebut the evidence, and the opportunity to present his case. These principles apply when the hearing body is a

> medical society tribunal or a hospital committee composed of physicians.
>
> These principles of fair play apply in all disciplinary hearings and in other type of hearing in which the physician may be deprived of valuable property rights. Whenever physicians sit in judgment on physicians and whenver (sic) that judgment affects a physicians (sic) reputation, professional statue, or livelihood, these principles of fair play must be observed.
>
> All physicians are urged to observe diligently these fundamental safeguards of due process whenever they are called upon to serve on a committee which will pass judgment on physicians. Medical societies and hospital medical staff are urged to review the constitutions and by-laws of the society or hospital medical staff to make sure that these instruments provide for such procedural safeguards.

Incredibly, the Board argues in its Response (pp. 16-18) that this applies only to the Hospital Board, and not to the medical staff committees, because the Board itself is charged with making the ultimate decisions.

The language of the AMA ethics will not support such a restrictive reading. Whatever may have been the case in the Iowa decision the Board cites, the medical staff committees are not conducting mere "investigations." The Board is lawfully bound to defer to the committees' judgments.

Dr. Shahawy would submit that the AMA ethics mean exactly what they say: than any time a group of physicians is deliberating on another physician's privileges, that physician has a right to be heard. But, at the very least, the principles

have to mean, as due process requires, that the physician be given an opportunity to be present and to be heard when some deliberative party is making an actual decision on the merits of his privileges—and not just an appeal, where a tribunal is to determine only if there is "any evidence" to support an adverse recommendation.

If a physician has no right to be heard when an initial determination is made, then due process means nothing at all. All of the elaborate statutes and regulations governing privileging proceedings can be abolished, hospitals and physicians can quit spending massive amounts of money determining the physician's right to earn a livelihood, and physicians will just have to learn that if they expect to earn a living and serve the community, they will have to stay in good favor with the medical staff politicos.

Dr. Shahawy respectfully and earnestly urges this Court not to sanction such an abdication of judicial responsibility.

NO SUBSTANTIAL AND COMPETENT EVIDENCE

The proceedings below were so tainted from beginning to end with due process violations that application of the "substantial competent evidence" test would, Dr. Shahawy respectfully submits, be ludicrous. Nevertheless, Dr. Shahawy would further submit, there is in fact no "substantial competent evidence" to support the Board's termination of his medical staff privileges, or his Swan Ganz (sic) privileges.

Dr. Shahawy was a member of the staff at Sarasota Memorial Hospital for over eight years. He did Swan Ganz (sic) catheterizations for over eight years. In 1980, in the hearing on Dr. Shahawy's application for cardiac catheterization laboratory privileges, Board Chairman James Tollerton said, "No one will deny that Dr. Shahawy is qualified to do the procedure...."

Dr. Shahawy graduated from the Vienna Medical School

summa cum laude, as the first non-Austrian student to obtain that honor. After graduation, he worked at Vienna University in internal medicine and in cardiology. During those five years, he also obtained a diploma of medicine in cardiovascular disease from the University of Vienna. From 1968 to 1971, Dr. Shahawy participated in a fellowship at the Mayo Clinic. This included one year of research in cardiovascular projects. In 1971, he received a Masters of Science degree in cardiovascular disease from the Mayo Clinic. For the next two years, he served as a fellow, teaching fellow, and instructor in cardiology at the Medical College of Georgia. In 1973, he became an assistant professor of medicine and cardiology at the University of Florida. He remained in that position for two-and-a-half years, while also acting, for one year, as acting director of the adult cardiac cath lab and one year as director of the heart station and coronary care unit. He also supervised the Veterans Administration Hospital catheterization laboratory in Gainesville.

Dr. Shahawy is certified in the sub-specialty of cardiovascular disease by the American Board of Internal Medicine and by the Canadian Board of Internal Medicine. He is a fellow in the American College of Cardiology. He has had published more than 35 articles and abstracts in the cardiovascular field.

The only physician who testify (sic) from first hand knowledge of Dr. Shahawy's skills testified unequivocably in his favor. Board Certified Cadiologist Robert Graybeal, M.D., testified:

Q. Have you had occasion, Dr. Graybeal, to observe Dr. Mahfouz El Shahawy in his work, as a cardiologist?

A. Yes, I have.

Q. And more particularly in his work in the field of invasive cardiology with regard to the Swan Ganz (sic) catheterization?

A. Yes. I estimate that over a 10-year period I have probably witnessed, or known, of a dozen Swan Ganz (sic) insertions.

Q. I want you to tell the Board, if you will, sir, whether or not, based upon your observations and based upon your knowledge and training as an individual who does this type of procedure, whether or not you have an opinion as to whether Dr. Shahawy performs this procedure as skillfully as other physicians of ordinary skill and training who do this procedure?

A. I believe that he does, I can't recall any injury, a patient injury, as a result of his effort to insert such a catheter. And I think he has always been successful in inserting them into cases I'm familiar with.

Q. Okay, sir. In your opinion does Dr. Shahawy have familiarity with basic anatomy in terms of its application to this procedure?

A. I feel that he does, yes.

Q. Do you feel the period of time that is generally required in uncomplicated cases for Dr. Shahawy to perform this procedure is inordinately or unduly lengthy?

A. I don't think so. I think some of the cases I'm

familiar with have been successful in less than 10 minutes. That's certainly satisfactory.

[App. 1380-81]

Nephrologist Ross Tucker, M.D., testified from his observations that Dr. Shahawy's professional abilities were "superior." This Court has also the more dramatic testimony of Dr. Tucker before the Board in January, 1983, in the prior petition.

Despite this evidence, the Board based its finding of clinical incompetence on the testimony of two nurses and a respiratory therapist regarding two Swan Ganz (sic) catheterizations Dr. Shahawy performed in late 1983 and early 1984, on two seriously ill patients who did exceedingly well under Dr. Shahawy's care.

The first procedure, involving a Dr. John O'Neil (sic) as a patient, has previously been described to this Court in the prior Petition. Janet Sclafani testified that the procedure, which should take 15-20 minutes, took an hour and was poorly done, and gave the patient phlebitis because of Dr. Shahawy's supposedly contaminating the sterile field with his forearm. The patient himself, however, testified before the Board in January, 1983. With no notice of Ms. Sclafani's charges, Dr. O'Neil (sic) testified that he was awake for the procedure, that it took approximately 15-20 minutes, that it was conducted in a professional and professional and (sic) dignified manner, that there were no incidents or complications, and that he had no infections. [App. (Case 83-1534) pp. 3716-17] The charts for Dr. O'Neal (sic) [App. (Case 83-1534) pp. 3213-3325] showed that the procedure was completed without incident, and the patient was not even out of the room for an hour.

Regarding patient Werner Fricke, the nurses and techni-

cian claimed that the procedure, which took two hours and twenty minutes because of Mr. Fricke's condition, was unduly prolonged and resulted in excessive blood loss. As Dr. Shahawy explained [App. 1493-1505], he was required by the patient's anatomy to make three attempts, first in the neck, then in the right arm, then in the left arm, to insert the catheter. The alleged blood loss would be but is not supported by the record and the patient's vital statistics—because it did not happen. Two of the witnesses claimed that Dr. Shahawy mistook a tendon for a vein. And one (who gave a written "report" but did not testify) claimed that Dr. Shahawy contaminated the sterile field.

The Board also had the deposition testimony of technician Curtis Williams. [App. 355] Mr. Williams claimed he had seen Dr. Shahawy perform at least at least a dozen Swan Ganz (sic) procedures. [Respondent's p. 32] Ms. Sclafani also said she had seen Dr. Shahawy do a dozen Swan Ganz (sic) procedures. [App. 1304] And Ms. Champlain (sic) said she had observed Dr. Shahawy in "roughly five" Swan Ganz (sic) procedures. Ms. Sclafani was present only *once*. And Ms. Champlain (sic) was present only twice.

On the basis of this testimony the Board found Dr. Shahawy clinically incompetent. No patient has been injured, or received anything but exceptionally good health care. No patient has claimed Dr. Shahawy has committed malpractice. No physician has testified that Dr. Shahawy's abilities are substandard. Indeed, the only physicians who testifed from first-hand knowledge said he was capable to perform these and other procedures. The medical charts show no complica-

ations. Charts of patient Dr. O'Neil (sic) show the procedure was not prolonged as indicated by Ms. Sclafani. Dr. O'Neil (sic) himself confirmed this and refuted Ms. Sclafani's charges that he had developed phlebitis. There is nothing to confirm the supposed inordinate blood loss with patient Fricke. The vital statistics and bloodwork should have indicated if there had been such a problem, and they did not. [*See* App. 1493-1505]

To call this the "substantial competent evidence" needed to ruin a physician's career would make a mockery of the law.

The Hospital Board went to great length to brand Dr. Shahawy "disruptive," because he sued certain physicians involved in excluding him from the cardiac catheterization laboratory. The Board repeats that effort in its Response.

In the certiorari proceeding from the Hospital Board's 1980 denial of Dr. Shahawy's application for catheterization privileges, Mr. Lamar Matthews, the attorney for the Hospital Board in this very proceeding, denied that Dr. Shahawy was in any way disruptive, and stated, "Dr. El Shahawy is an outstanding physician and a valued member of our Hospital staff." The only thing that has happened to change the Board's opinion of Dr. Shahawy since February, 1981, is that he has filed lawsuits, exercising his First Amendment right to petition for redress.

It is evident that certain members of the medical staff dislike Dr. Shahawy. They resent his attempts to penetrate their exclusive enclave. When they ruthlessly crushed his efforts to do so, he complained bitterly, and he filed lawsuits. If Dr. Shahawy's complaints about the unbelievably shabby treatment he has received at Sarasota Memorial are grounds for

dismissal, then there is no due process of law, and physicians can go back to running hospitals however they deem fit. Dr. Shahawy earnestly urges this Court not to let that happen.

CONCLUSION

There has been no due process in this case. There has be (sic) no valid suspension of Dr. Shahawy's Swan Ganz (sic) privileges, and no valid ejection of Dr. Shahawy from the Sarasota Memorial medical staff.

The decisions of the Hospital Board suspending Dr. Shahawy's privileges should therefore be quashed, Dr. Shahawy's privileges should be restored, and he should be awarded his expenses in this proceeding.

Respectfully submitted,
BAILEY & DAWES
a professional association
Fifth Floor
1390 Brickell Avenue
Miami, Florida 33131-1366
(305) 374-5505

By /S/
Guy B. Bailey, Jr.

And

By /S/
Jesse C. Jones

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to A. Lamar Mathews (sic), Jr., Esquire, Williams, Parker, Harrison, Dietz & Getzen, Post

Office Box 3258, 1550 Ringling Boulevard, Sarasota, Florida 33578, and to William M. Hereford, Esquire, Herefore, Taylor and Lawless, P.A., 46 North Washington Bouevard (sic), Sarasota, Flroida (sic) 33577, this 24th day of April, 1984.

/S/

Of Counsel

IN THE CIRCUIT COURT FOR SARASOTA COUNTY, FLORIDA

MAHFOUZ EL SHAHAWY, M.D., etc.,
Petitioner,
-vs-
SARASOTA COUNTY PUBLIC HOSPITAL BOARD,
Respondent.

CASE NO. *83-1534-CA-01*
and
CASE NO. 84-115-CA-01
NOTICE OF HEARING

TO: Mahfouz El Shahawy, M.D.
1851 Arlington Street, Suite 206
Sarasota, Florida 33579

YOU ARE HEREBY NOTIFIED that the undersigned has set down for oral argument before the Honorable James S. Parker, one of the Judges of the above-styled Court, in chambers located at Desoto County Courthouse, Arcadia, Florida, at 1:30 P.M. on the 30th day of August, 1984, or as soon thereafter as counsel may be heard on PETITION FOR CERTIORARI.

DATED this 5th day of July, 1984.

I HEREBY CERTIFY that a copy of the foregoing Notice of Hearing was served upon the above-named addressee by mail this 5th day of July, 1984.

WILLIAMS, PARKER, HARRISON, DIETZ & GETZEN
JOHN V. CANNON, III
By: /S/
1550 Ringling Boulevard
Sarasota, Florida 33577
813/366-4800
ATTORNEY FOR RESPONDENT

TIME RESERVED: 2 hours

No. 842036

Supreme Court, U.S.
FILED
SEP 10 19
JOSEPH F. SPANIOL
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

Mahfouz El Shahawy, M.D.,
Petitioner

v.

Sarasota County Public Hospital Board, Sarasota, Florida

On Sworn Petition for Writ of Certiorari Directed to District Court of Appeal Florida Second District in Case No. 84-1738

PETITIONER'S REPLY BRIEF

MAHFOUZ EL SHAHAWY, M.D.
1851 Arlington Street
Suite 206
Sarasota, Florida 33579
(813) 366-9800
Petitioner Pro Se

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Whether the petitioner's due process right to his day in court in equity under section one of the fourteenth amendment of the United States Constitution has been violated.

Whether a decision, on the federal issue raised of an unconstitutional denial of petitioner's right to a day in court in equity, would change the outcome of the case and thus render the State-Law ground of decision not adequate to support the decision rendered with the consequence that this Court will take jurisdiction to review the case, notwithstanding whether Florida law traditional or otherwise supports the grounds of decision or not.

Whether despite the lack of a definitive ruling, on the federal constitutional issue raised, by the appeal

court this Court will decide the federal question raised.

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STATEMENT OF THE CASE

Petitioner has stated the case clearly in his initial brief to the court, petitioner's initial brief pages 7-14.

Respondent's brief in opposition intends to divert the court's attention from the narrow legal issue in this case of an unconstitutional denial of petitioner's day in court in equity.

Respondent's counsel is fully aware that the reason for not renewing petitioner's privileges at Sarasota County Public Hospital Board in 1983 was a retailatory action because of the suits filed earlier by the petitioner in 1982 against the Hospital counsel, some physicians and the Hospital Board for unlawful denial of special privileges, called "cardiac catheterization," for the petitioner at the public hospital. This case is still pending on appeal, App.A Respondent's brief is misleading.

Petitioner has deliberately omitted in his initial brief (i) any reference to other proceedings between these parties (ii) factual details regarding the merits of the Hospital's termination of Shahawy's medical staff privileges, and (iii) iteration of the details of the due process and by-law violations which surrounded the Hospital's actions in terminating his staff privileges. While this would provide interesting "color" to the court and of course are presumed to be true for the purposes of the court's dismissal with prejudice, they are wholly irrelevant to the issue in this Petition for Writ of Certiorari before the United States Supreme Court. That issue is Shahawy's right to maintain an equitable action challenging the administrative action, on record and non-record grounds, during the pendency of a later-filed and already voluntarily dismissed on-the-record certiorari

review of the administrative action by the County Judge sitting in his capacity as a Circuit Judge. Respondent in his brief in opposition, attempted to color this petition to the United States Supreme Court with other details or matters which could have no purpose but to detract from a determination of this narrow legal issue of denial of petitioner's due process right to his day in court in equity under section one of the fourteenth amendment of the United States Constitution.

It is fascinating to observe the extraordinary tactics to which the respondent has resorted in order to prevent petitioner from having his day in court in equity, including charges that petitioner has attempted to deceive this Court in his petition for certiorari, which are shown to be themselves false and deceitful as will be elaborated hereinafter.

ARGUMENT

Respondent's Brief in opposition is misleading, deceptive and unresponsive.

Petitioner is not surprised to see these unfair tactics by the Hospital Board since they were defendants (App A)

In Florida the preservation of a litigant's right to equitable relief notwithstanding the availability of certiorari review is constitutionally mandated in order to perserve a litgants right of access to the court.

In equity the court may determine whether administrative action shocks the conscience where it is contrary to the overwhelming weight of the evidence on the record. The court in equity has the power to decide issues not possible on certiorari review of administrative action particularly when the governing board and it's counsel have exhibited prior bias and due process violations and retaliatory action against the

petitioner who has been challanging them already in a related matter in the court as stated above, see initial (pet 22).

Respondent's brief was unresponsive and misleading and intended to distract attention from the federal issue before the court.

A. Petitioner's citations for conflict are effective and valid.

Petitioner has cited for conflict under Rule 17 of this Court. Duplex Printing Press Co. v Deering 254 U.S. 443, 16A.L.R. 196 in Aberdeen Restaurant Corporation v Gottfried 285 N.Y.S. 832, 835 the Supreme Court of New York sitting in special session stated "Constitutionally, equity jurisdiction is an inherent element of the state court. If a litigant is entitled to an equitable remedy and has no adequate legal remedy, a destruction of such right of redress would be a denial of justice, and thus a violation of State and Federal

constitutions. In fact in Duplex Printing Press Co. v Deering, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349 16 A.L.R. 196, the Supreme Court of the United States so held." It is significant to note that respondent failed to comment on the following case: Duplex Printing Press Co. v Deering Supra, which hits on all fours and flawlessly establishes the conflict which enables this court to take jurisdiction here under Rule 17. Both petitioner's case and Duplex supra involve the fundamental constitutional right of a litigant to earn a living.

B. **In Florida concurrent jurisdiction in equity and by certiorari exist's to review quaisi-judicial action of local administrative boards.**

Respondent alleges that in Florida, quasi-judicial local administrative action is reviewable only by common law certiorari. Petitioners then attorney,

Arther England Jr. (Former Chief Justice of the Supreme Court of Florida) in his reply brief on appeal (Pet App. 156-157) convincingly expounded that that contention was wrong.

The tortured analysis of precedents which respondent would have this Court control this aspect of this case (see Resp. Brief 11-12) is bottomed on antiquated doctrines which are no longer viable in Florida. Respondent plainly misunderstands the judicial policy which is discussed in Key Haven Associated Enterprises, Inc. v Board of Trustees 427 So 2nd 153 (Fla. 1982), as related to the executive and judicial branches of government. The administrative procedures act, Chapter 120,* admittedly does not apply in this case. It did, however, fully displace the distinctions between quasi-this and quasi-that which respondent would resurrect in order to spin its argument. See 1 Florida Admin.

*West Fla. Stat Anno.

Prac. Manual, Ch 2 at pp 18-19 (D & S Publ). Incidently, that Florida Admin. Prac. Manual was authored by the very same Arthur England Jr. a recognized authority in that field of law.

Furthermore, the preservation of a litigant's right to equitable relief, notwithstanding the availibility of certiorari review, is constitutionally mandated in order to preserve a litigant's right of access to the courts. Article I, Section 21, Florida constitution. Therefore, the legislature cannot limit the constitutional powers of the circuit court to issue injunctions and extraordinary writs; despite the legislature's having granted the district courts of appeal the power of direct review by certiorari of administrative action, collateral review by the circuit courts continues pursuant to their traditional equitable powers. State ex rel. Dept. of Gen. Serv. v

Willis, 344 So 2nd 580, 589 (Fla. 1st DCA 1977). Vol 33 University of Miami Law Review (1978-79) page 745.

Even if there were no Fla. App. Rule 9.110 or judicial policy correlative to the administrative procedures act, for local cases outside the act's jurisdiction, enabling collateral review of administrative action in equity pursuant to the circuit court's traditional equitable jurisdiciton (but we must presume that rule 9.110 and judicial policy do harmonize with the constitution and are fully constitutional until some court of competent jurisdiction finds otherwise) Article I, Section 21 Fla Const. would mandate, because it is self executing, that collateral review by the circuit courts of local administrative action would continue in equity pursuant to their traditional jurisdiction in equity, notwithstanding any direct review by certiorari which might be available in those local cases.

Thus we must presume that Rule 9.110 and judicial policy, applicable to cases outside the jurisdiction of the Florida Administrative Procedures Act such as this instant case, implement the constitutional mandate of Article I, Section 21 Fla. Const. and preserve a litigants access to the courts and right of equitable review of local administrative judicial action notwithstanding a right of direct review of that action by certiorari.

C. Respondent's Brief is deceptive.

Petitioner did not allege that his request for declaratory relief was contained in his initial petition as respondent alleges. (Resp. Brief-8). The petition for certiorari to this court correctly stated that a petition for injunctive and equitable relief was filed initially (Pet. 7) and correctly stated that "the trial court's refusal to permit Shahawy

to maintain, not newly commence, a pre-existing action for equitable and declaratory relief against the Hospital Board ***** constitutes error ****" (Pet. 19). The pre-existing action referred to was the equitable action, not the proposed amendment which included a request for declaratory relief. That equitable action subsisted upon the trial court's express invitation. (Pet App. 32).

Respondent's statement, that the "petitioner states that he moved to stay the related action and therefore attempted to conserve judicial resources by maintaining only one action for declaratory relief", is a false allegation by respondent. (Resp. Brief 8) petitioner stated no such thing in his petition to this Court. Petitioner did not try to conceal that he moved to stay the ruling, the order of the Hospital Board. Petitioner correctly stated in his

petition to this Court that he moved to stay the "Hospital Action". (Pet. 8-9) and petitioner correctly stated to this Court in his petition that he moved to stay the "Hospital order" and to stay the "Hospital ruling". (Pet. 27-28). It is respondent's brief that is desperately deceptive. Petitioner's petition is not "blatently deceptive" as alleged by the respondent. Petitioner alleged "a record only review such as certiorari is plainly not a duplication (let alone an exact duplication) of an action which seeks declaratory and equitable relief from record and non-record denials of due-process and violations of the Hospital's governing by-laws." (Pet. 27-28). Respondent's statement that the claims in the proposed amended petition and the claims in the related action for certiorari below constitute an exact identity of issues, is false and misleading. (Resp. Brief 9). The court in

equity has the power to decide issues not possible on certiorari review of administrative action; (See Pet. 22). Further, Florida follows the substantial competent evidence rule under which the reviewing court does not weigh the evidence where administrative action is reviewed by certiorari itself record bound: Fla. Dept. of Health and R.S. v Career Serv. Comm. (Fla. App) 289 So2d 412, Degroot v Sheffield (Fla 1957) 95 So2d 912, 916, State Dept. of Agriculture and Conservation v Strickland (Fla. App 1972) 262 So2d 893. Further, by way of illustration a contrario, in equity the court may determine whether administrative action shocks the conscience where it is contrary to the overwhelming weight of the evidence on the record.

All the facts critical for meaningful review have been correctly stated as shown heretofore in this reply brief.

D. Despite no express opinion by Appellate Court jurisdiction exists here.

Respondent alleges "without a written opinion and without precedential value, it is difficult to perceive how the Florida Court's decision could set forth an important federal issue or cause a conflict of decisions which mandates critical review under this Court's extraordinary jurisdiction." (Resp. Brief 6). The record herein shows that the federal issue was properly and timely raised in the state court system according to state law. (Pet. 12, 13, 38, 39, 40) (Pet. App. 139-140, 161). Under those circumstances the federal question involved can then be considered by the Supreme Court, despite the lack of a definitive ruling on the federal issue raised by the court of last resort. 2 Fed Proc. L. Ed page 314; Street v New York (1969) 394 U.S. 576, 22L Ed 2nd 572, 89 S. Ct 1354; Chambers

v Mississippi 410 U.S. 284, 35L Ed 2nd 297, 93 S. Ct 1038.

Further, the state law ground of decision that because of pending certiorari proceeding petitioner's motion was denied with prejudice, which effectively dismissed his action with prejudice, is not adequate to support the decision not only because it is not supported by state practice and determinations of the state's highest court but because that ground does not have sufficient breadth to support the decision. Abie State Bank v Bryan (1931) 282 US 765, 75 L Ed 690, 51 S. CT 252; 2 Fed Proc L Ed page 322. If despite the fact that a state court disposed of a case on state grounds a decision on the federal issue would change the outcome of the case, the state ground is not adequate, and the Supreme Court has jurisdiction to review the case 2 Fed Proc L Ed page 322; Chicago, B & Q R. Co. v Illinois

(1906) 200 US 561, 50 L Ed 596, 26 S. Ct 341. Thus, even if respondent's assertion that in Florida quasi-judicial administrative action of a local agency is reviewable only by common law certiorari were true, the Supreme Court still has jurisdiction to review this case because the state law ground of decision does not have enough bredth to support the decision Abie State Bank v Bryan supra, and a decision on the federal issue of denial of petitioner's right to a day in court in equity would change the outcome of the case.

It is settled as stated in Chicago B & Q R. Co. v Illinois (1906) supra that "the failure of the state court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set

up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law." It is obvious that petitioner's claimed right to his day in court in equity under the due process clause of the fouteenth amendment to the United States Constitution if recognized and enforced would require a jugdment different from the judgment of the circuit judge who by dismissing petitioner's motion to amend with prejudice because of "pending certiorari proceeding" effectively dismissed his action with prejudice. Respondent's argument is hopeless. Also the per currium affirmance without express opinion adopted the trial court's judgment, with conflict by necessary implication.

E. Petitioner did not elect remedy by certiorari.

Petitioner's action for equitable relief was filed before his certiorari

action, case Key Haven (Resp Brief 13) cited to show petitioner elected to pursue remedy by certiorari in bar of the equitable action is authority to the contrary. Key Haven is authority that if petitioner elected to pursue any remedy it was the before-filed equitable remedy.

F. Aetna is still valid as precedent.

Calvert Fire Ins. Co. v Will 560 F2nd 792 merely held the federal action should be adjudicated, in case of concurrent jurisdiction in federal and state courts, and not dismissed. It thereby confirmed the decision in Aetna cited by petitioner for conflict in which the Federal Appellate Court reversed an order because that order was repugnant to a motion to abate an action because it dismissed the action instead of staying it and did not controvert that descision as claimed by respondent. It merely modified the Aetna decision,

by holding that the federal district judge should have immediately adjudicated the matter. Then in Will v Calvert Fire Insurance Co. 437 US 655 this court reversed the appeal court and held that the district judge did not have to immediately adjudicate the matter but could stay the action. Aetna is still valid contrary to respondent's allegation.

Clearly an overruled decision is not a binding precedent but it is the practice of courts to recede from a previous decision only to the extent that the previous opinion is inconsistant with the court's present position. 13 Fla Jur 2d page 271. Bancroft v Allen (1939) 138 Fla 841, 190 So 885.

CONCLUSSION

Respondent's brief in opposition was carefully crafted to confuse the narrow legal issue before the court, ie depriviation of petitioner's right to

his day in court in equity. The court in equity has the power to decide issues not possible on certiorari review of administrative action. Furthermore, the Court in equity may determine whether the administrative action shocks the conscience. Petitioner can see why hospital counsel and board members who were and still are defendants in related suits would like to be shielded from discovery of their wrongful actions. The highest court of this country should neither condone or sanction the wrongful and retaliatory action which was taken by the public Hospital Board, nor allow the error of the lower courts to establish a wrongful, unconstitutional and conflicting precedent to stand.

For the aforementioned reasons the petitioner prays this Honorable Court take jurisdiction of this matter and grant certiorari. Respectfully,

Mahfouz El Shahawy
Petitioner pro se

APPENDIX A

IN THE UNITED STATES DISTRICT
COURT MIDDLE DISTRICT OF FLORIDA

CASE NO. 82-1207-CIV-T-WC
ELEVENTH CIRCUIT CASE NO. 83-3650

MAHFOUZ EL SHAHAWY, M.D., M.S.,
F.A.C.C., F.C.C.P., individually,
and MAHFOUZ EL SHAHAWY M.D., P.A.,
a Floirda professional Asssociation,

Plaintiffs,

vs.

WILLIAM T. HARRISON, JR., DAVID BOWMAN, LAMAR MATHEWS, F. EDWARDS RUSHTON, M.D., JOHN N. CARLSON, M.D., WILLIAM L. PAGE, M.D., RICHARD J. SARKIS M.D., MARC SILVERSTEIN M.D., DAVID J. STUTZ, M.D., PONNUSWAMY NATARAJAN, M.D., CHARLES R. MATHEWS, M.D., EUGENE MEYERS, M.D., PATRICK R. DELMASTRO, M.D., JOHN CHIDSEY, M.D., BRUCE FLEEGLER, M.D., H.J. FLOYD, I.J. RAND, C. TED FRENCH, JAMES TOLLERTON, SARASOTA COUNTY PUBLIC HOSPITAL BOARD, a Florida public corporation, and JOHN DOES I THROUGH X, a fictitious name for co-conspirators not yet identified,

Defendents.

_____/

AMMENDED AND SUPPLEMENTAL COMPLAINT FOR ANTITRUST, CIVIL RIGHTS, RICO, AND STATE LAW VIOLATIONS

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Petition was furnished by mail to Lamar Matthews Jr. et al. c/o Williams, Parker, Harrison, Dietz and Getzen, 1550 Ringling Blvd., Sarasota, Florida 33578, Charles Johnson, Chairman of the Board, Sarasota County Public Hospital Board, 1501 North Drive, Sarasota, Florida 33579, and Mr. Philip Beauchamp, Administrator, Sarasota Memorial Hospital, 1700 Tamiami Trail, Sarasota, Florida 33579, this 6th day of September 1985.

M. El Shahawy, M.D., Petitioner pro se
1851 Arlington Street, Suite 206
Sarasota, Florida 33579
(813) 366-9800